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No. 95 -

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

APPENDIX VOL. 1 TO PETITION FOR WRIT OF CERTIORARI

APPENDICES A-Q

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,
Petitioner-Appellant,

v.

DANIEL B. VASQUEZ, Warden, San Quentin State Prison,
Respondent-Appellee.

No. 92-15828

D.C. No. CV-92-5167-REC

OPINION

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, District Judge, Presiding

Argued and Submitted
October 11, 1994—San Francisco, California

Filed May 26, 1995

Before: Betty B. Fletcher, Stephen Reinhardt, Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Reinhardt;
Concurrence by Judge Kleinfeld

SUMMARY

Criminal Law and Procedure/ Habeas Corpus/Capital Cases

The court of appeals reversed a district court judgment and remanded. The court held that, in light of extraordinary delay, a defendant could bring his habeas petition regarding the constitutionality of his conviction despite the fact that the state of

California had not yet made a final ruling on his death sentence.

In 1980, appellant Richard Phillips was convicted of first degree murder with special circumstance, attempted murder and robbery. He was sentenced to death. In 1985, the Supreme Court of California affirmed Phillips' conviction but reversed his death sentence. Phillips was not resentenced to death until 1992; the automatic appeal from that sentence is pending before the state supreme court.

Phillips petitioned for a writ of habeas corpus in 1992. His petition contained only claims arising from his conviction. The district court dismissed the habeas petition without prejudice on two grounds. First, it declined to interfere with the ongoing state criminal proceeding under the abstention doctrine first articulated in *Younger v. Harris*. Second, because Phillips' sentencing appeal was still pending, the court dismissed the petition on the ground that he had not exhausted available state remedies as required by *Rose v. Lundy*.

Phillips sought to appeal the decision to dismiss his petition, but the district court declined to issue a certificate of probable cause. The court of appeals granted Phillips' request for a certificate of probable cause.

[1] California has bifurcated into "separate phases" what it calls the guilt phase and the penalty phase of death penalty cases. It was undisputed that the guilt phase of this case was final. Habeas corpus proceedings regarding the guilt phase would not affect the ongoing state proceedings. [2] The Supreme Court's holding in *Younger* that federal courts must exercise significant caution in enjoining ongoing state criminal proceedings was inapplicable to this case. The abstention doctrine did not prevent review of Phillips' petition. [3] In addition, the district court erred in dismissing Phillips' habeas petition for failure to exhaust state remedies under *Rose*. [4] Phillips sought only to attack his conviction and did not (and

could not) seek federal review of claims arising from his sentence.

[5] In this case, Phillips' right to reasonably prompt constitutional scrutiny of his conviction outweighed any prudential concerns that might have existed. [6] Almost 15 years had passed since the date of Phillips' conviction. It had been ten years since the state supreme court vacated Phillips' first death sentence. More than three years passed since the second death penalty trial. [7] And, there was no end in sight. [8] The jurisprudential concerns were relatively weak when balanced against the significant harms that could have arisen from further delay. [9] The delay in this case rendered the state corrective process "ineffective" within the meaning of a relevant habeas statute. [10] Fifteen years, with no end in sight, was simply too long a period to require a prisoner to await review of what might be an unconstitutional conviction, merely because an entirely separate and independent review of his sentence had not been resolved in a timely fashion. [11] Thus, Phillips' habeas petition was reinstated.

Circuit Judge Kleinfeld concurred, stating that *Younger* applied, but contained an equitable exception for cases like this one. Circuit Judge Kleinfeld also expressed the belief that the court of appeals did not have the power to hold that, if Phillips filed a subsequent petition attacking his sentence, he would have demonstrated "good cause" for filing more than one petition.

COUNSEL

Donald Horvath, Fresno, California, for the petitioner-appellant.

Edmund D. McMurray, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

REINHARDT, Circuit Judge:

It has been almost fifteen years since Richard Louis Arnold Phillips was convicted of murder and first sentenced to death, and ten years since the state supreme court affirmed his conviction and vacated his sentence. The question before us is whether we should now review the constitutionality of Phillips' conviction or require him to continue to wait until the state has rendered a final decision regarding his sentence before allowing him to petition for habeas review of the conviction.

BACKGROUND

In 1980, Phillips was convicted of first degree murder with special circumstance, attempted murder, and robbery; he was subsequently sentenced to death. The State of California has bifurcated the process for adjudicating guilt and imposing a death sentence; thus, the death sentence is imposed through an entirely separate trial. In 1985, the Supreme Court of California affirmed Phillips' conviction but reversed his death sentence. *People v. Phillips*, 711 P.2d 423 (Cal. 1985). Phillips was not resentenced to death until 1992; the automatic appeal from that sentence has been pending before the state supreme court since early 1993. Thus, Phillips' conviction has been final for approximately ten years while the validity of his death sentence remains unresolved.

Despite the significant delay that has already taken place, there is no indication that Phillips' appeal from his sentence will be decided anytime in the near future. To the contrary, due to significant problems involving inaccuracies in the sentencing trial transcript, it appears that the state supreme court may not decide the case for some time. Thus, there is no way to determine when Phillips' sentence will be final, even assuming that the state supreme court will affirm it. Of

course, if that court again finds errors in the sentencing decision, Phillips may well be forced to wait another substantial period of time before any sentence becomes final under state law.

Phillips petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in 1992; his petition contained only claims arising from his conviction. The district court dismissed the habeas petition without prejudice on two grounds. First, it declined to interfere with the ongoing state criminal proceeding under the abstention doctrine first articulated in *Younger v. Harris*, 401 U.S. 37 (1971). Second, because Phillips' sentencing appeal was still pending, it dismissed the petition on the ground that he had not exhausted available state remedies as required by *Rose v. Lundy*, 455 U.S. 509 (1982). The district court subsequently declined to issue a certificate of probable cause when Phillips sought to appeal its decision to dismiss his petition.

We granted Phillips' request for a certificate of probable cause and instructed the parties to submit briefs regarding the exhaustion and abstention issues. Accordingly, we may exercise jurisdiction over the district court's denial of Phillips' habeas claim under 28 U.S.C. § 2253.

In light of the extraordinary delay, we hold that Phillips may bring his habeas petition regarding the constitutionality of his conviction despite the fact that the state has not yet made a final ruling on his sentence. We conclude that Phillips' right to reasonably prompt review of his conviction outweighs the jurisprudential concerns that might otherwise lead us to decline to review his petition. Neither *Rose* nor *Younger* prevents him from seeking and obtaining habeas review of his conviction.

ANALYSIS

A. *Finality of the Judgment*

The state does not contest Phillips' argument that his state conviction is final. It argues that he is not yet subject to a final judgment, because his sentence is not yet final.

[1] California procedure separates the determination of guilt from the determination of penalty especially sharply. California has bifurcated into "separate phases" what it calls the guilt phase and the penalty phase of death penalty cases. See Cal. Penal Code § 190.1. It is undisputed that the guilt phase of this case is final.[1] It has been affirmed by the California Supreme Court. No further review of the guilt phase in state court is available. Habeas corpus proceedings regarding the guilt phase will not affect the ongoing state proceedings.

B. *The Requirements of* Younger *and* Rose

Although the state makes no argument regarding the finality of the judgment under California law, it asserts that federal law — specifically the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), and the exhaustion requirement of

[1]Indeed, the state courts have consistently held that a conviction under California's bifurcated process for adjudicating death penalty cases is a final judgment. For example, in *People v. Jackson*, 429 P.2d 600, 602 (Cal. 1967) (discussing the retroactive application of *Escobedo v. Illinois*, 378 U.S. 478 (1965)), the Supreme Court of California noted that "[a] judgment becomes final when all avenues of direct review are exhausted" and specifically held that a conviction for murder is a final judgment even when the death penalty sentence has been reversed and is not yet final. Similarly, the Supreme Court of California noted that when a judgment is vacated only insofar as it relates to the death penalty, "[t]he scope of th[e] retrial is a matter of state procedure under which the original judgment on the issue of guilt remains final during retrial of the penalty issue and during all appellate proceedings reviewing the trial court's decision on that issue." *People v. Kemp*, 517 P.2d 826, 828 (Cal. 1974) (discussing the application of *Escobedo*).

Rose v. Lundy, 455 U.S. 509 (1982) — precludes this court from considering Phillips' habeas petition until the state courts have reached a final determination concerning his sentence. We disagree.

[2] First, on appeal Phillips does not seek to enjoin an ongoing state proceeding; instead, he seeks only to collaterally attack his conviction. The state has already adjudicated Phillips' guilt, its decision in that regard is final, and Phillips seeks nothing more than federal review of that decision. The ongoing state proceeding involves sentencing only, and the state is free to continue with its sentencing determination. The rule against staying a proceeding does not prevent us from deciding a related issue, even if that decision ultimately renders the state proceeding moot. Thus, the Supreme Court's holding in *Younger* that federal courts must exercise significant caution in enjoining ongoing state criminal proceedings is inapplicable to the case before us. Accordingly, we hold that the abstention doctrine does not prevent us from reviewing Phillips' petition.[2]

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[2]In his separate concurrence, Judge Kleinfeld asserts that *Younger* should generally apply but concludes that an exception to *Younger* justifies our decision in this case. However, the only cases he cites concern the application of *Younger* to ongoing trials or direct appeals. *See, e.g., Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975) (concluding that *Younger* applies to state appellate proceedings as well as to ongoing proceedings in a state trial court); *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983) (declining to provide a petitioner appellate counsel and trial transcripts for an ongoing state appeal from a state criminal trial); *Drury v. Cox*, 457 F.2d 764, 764-65 (9th Cir. 1972) (declining to entertain a petition claiming that the state lacked probable cause to bind a defendant over for trial when the defendant had not yet been convicted in state court). Here, in contrast, the state proceeding regarding Phillips' conviction is final and, according to Phillips, fully exhausted both with regard to direct and collateral state remedies; our decision, if favorable to Phillips, would simply overturn the result in a completed state proceeding just like decisions ordinarily do in the case of successful habeas petitions. The only difference, here, is that a decision on the merits of Phillips' habeas petition might effectively moot the state's entirely separate and independent adjudication of his sentence.

[3] Second, we conclude that the district court erred in dismissing Phillips' habeas petition for failure to exhaust state remedies under *Rose*. In *Rose*, the Supreme Court held that a petition containing both exhausted and unexhausted claims must be dismissed. The plurality opinion noted, however, that prisoners who submit mixed petitions "nevertheless are entitled to resubmit a petition with only exhausted claims or to exhaust the remainder of the claims." *Rose*, 455 U.S. at 520.[3]

Our concurring colleague's argument would be more persuasive if, as he suggests, " 'final judgment' " always " 'means sentence.' " Concurrence, at 5815 (quoting *Berman v. United States*, 302 U.S. 211, 212 (1937)). However, his reliance upon *Berman* is misplaced. First, as we discuss above, California law makes clear that a conviction is final even if the sentence is not. *See supra* note 1. More important, the Supreme Court has explicitly rejected the notion that final judgment always means sentence when, as here, the conviction and sentencing procedures are bifurcated. Indeed, it specifically held in *Brady v. State of Maryland*, 373 U.S. 83 (1963), that "the general rule that 'Final judgment in a criminal case means sentence. . . .' cannot be applied" to cases in which separate trials are conducted in determining a defendant's guilt and imposing his sentence. *Brady*, 373 U.S. at 85 n.1 (citations omitted). As the Court noted, the ground for its holding that the rule is inapplicable to such cases is that the defendant's guilt "is 'independent and unaffected by' what may transpire in a trial at which petitioner can receive only a life imprisonment or death sentence." *Id.* (citations omitted). Thus, *Younger* does not apply to this case.

[3]The Court added that "[b]y invoking this procedure . . . the prisoner would risk forfeiting consideration of his unexhausted claims in federal court" if a district court found that a second petition containing claims that were unexhausted in the first petition represented an abuse of the writ. *Rose*, 455 U.S. at 520-21. Indeed, the Court's recent decision in *McClesky v. Zant*, 111 S. Ct. 1454 (1991), suggests that most petitioners seeking to review their convictions without exhausting their claims regarding their sentences risk losing the opportunity to seek habeas review of their sentences at a later date. Phillips, of course, may not have to bring a second habeas petition because our ultimate decision renders the sentencing issues moot, because the state's sentencing decision is free from constitutional error, or because a life sentence is ultimately imposed. (Under state law, a person convicted of first degree murder with special circumstances can

[4] The plurality thus makes clear that a defendant may choose to submit a petition containing only exhausted claims, even when his remaining claims are unexhausted, without violating the principle articulated in *Rose*. Indeed, a number of appellate courts, including this one, have held that *Rose* does not require dismissal when the petition before the court contains only exhausted claims. *See, e.g., Powell v. Spalding*, 679 F.2d 163, 166 (9th Cir. 1982) (holding that courts may properly review a habeas "petition containing only exhausted issues"); *see also Peoples v. Fulcomer*, 882 F.2d 828, 832 (3d Cir. 1989); *Williams v. Maggio*, 727 F.2d 1387, 1389 (5th Cir.

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receive only a sentence of death or life imprisonment. *See* Cal. Penal Code § 190.3 (West 1988)).

However, even if Phillips were to bring a second habeas petition limited to challenging his sentence, under the extraordinary circumstances of this case, *see infra* pp. 5807-13, doing so would not represent an abuse of the writ. *See Burris v. Farley*, 1995 U.S. App. LEXIS 6225, at *3 (7th Cir. Mar. 28, 1995) (suggesting that a defendant in Phillips' situation would have a "persuasive answer" to an accusation that he had abused the writ). We note first that, although neither we nor the Supreme Court has considered whether two separate habeas proceedings may be instituted when a state has adopted a bifurcated process that results in two separate trials regarding the defendant's guilt and punishment, we doubt that the Supreme Court would ordinarily permit separate habeas proceedings in such cases. Accordingly, we do not base our determination as to a separate petition regarding Phillips' sentence on the fact that California's capital cases are bifurcated. Rather, we conclude that a person who has already waited fifteen years for a final decision in order to challenge the constitutionality of that conviction cannot be compelled to choose between bringing a petition regarding that conviction and forfeiting his right to challenge the sentence, on the one hand, and waiting until the sentence is final to file a habeas petition, on the other. Although our conclusion might under other circumstances constitute dictum, we make it a part of our opinion because we believe that Phillips is entitled to a resolution of this question before determining finally whether to attack his conviction separately. As the Seventh Circuit has recently noted, it would be patently unfair to contend that "a prisoner whose principal hope lies in setting aside his conviction must stake his life on prevailing (because, if he loses, he forfeits any entitlement to contest the penalty later)." *Burris*, 1995 U.S. App. LEXIS 6225, at *4.

1984); *Taylor v. Curry*, 708 F.2d 886, 889 (2d Cir. 1983), *cert. denied*, 464 U.S. 100 (1984). Thus, because Phillips sought only to attack his conviction and did not (and could not) seek federal review of claims arising from his sentence, the district court erred in dismissing the petition for failure to exhaust state remedies regarding his sentence.[4]

C. *Jurisprudential Concerns*

[5] We recognize, of course, that a decision to allow Phillips to pursue his habeas petition before the state renders a final decision regarding his sentence implicates many of the prudential concerns outlined in *Rose*, particularly those concerning the dangers of piecemeal litigation. However, we believe that in this case Phillips' right to reasonably prompt constitutional scrutiny of his conviction outweighs any prudential concerns that might exist.

We have consistently recognized that unusual delay in the state courts may justify a decision to protect a prisoner's right to a fair and prompt resolution of his constitutional claims despite the jurisprudential concerns that have led us to decline to review a claim or to require full exhaustion in other cases in which a proceeding related to the federal petition is pending in state court. For example, in *Coe v. Thurman*, 922 F.2d 528 (9th Cir. 1991), we held that a prisoner who brings a due process claim arising from delay in the state appellate process is not required to exhaust state remedies in order to obtain federal review of his claim. Indeed, we noted that extraordi-

[4]Phillips alleges that he fully exhausted all available state collateral remedies regarding his conviction before filing his habeas petition. However, it appears that Phillips did not properly serve the state in filing this petition, potentially depriving it of an opportunity to contest whether he fully exhausted state remedies for the claims within his petition. If on remand the district court finds that the state was not given an adequate opportunity to raise this issue, the state may contest whether Phillips exhausted these claims and, if not, whether his failure was an excusable one.

nary delay in the state courts can render state corrective processes "ineffective" within the meaning of section 2254(b) and that exhaustion is not required in such cases. *Coe*, 922 F.2d at 530. Similarly, in *Okot v. Callahan*, 788 F.2d 631, 633 (9th Cir. 1986), we noted that when a prisoner "receives ineffective relief in state court because of unreasonable delay, he may file a habeas proceeding in federal court. In such cases, federal habeas relief may well be available despite failure to exhaust state remedies." *Okot*, 768 F.2d at 633; *see also Story v. Kindt*, 26 F.3d 402, 405 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 593 (1994); *Burkett v. Cunningham*, 826 F.2d 1208, 1218 (3d Cir. 1987).

1. *The Significance of Extraordinary Delay in the State Courts*

[6] In the case before us, almost fifteen years have passed since the date of Phillips' conviction. It has been a decade and a half since Phillips was first sentenced to death and ten years since the state supreme court vacated that sentence. More than three years have passed since the second death penalty trial took place.

[7] In addition, as the state concedes, there is no end in sight. It has already taken a significant amount of time for some of the inaccuracies in the trial transcripts to be corrected, and counsel indicated to us at oral argument that further revisions will be necessary. Moreover, it is quite possible that the state supreme court will again find errors in the sentencing decision and that any state determination as to Phillips' sentence may not become final for an additional number of years. Therefore, if we refuse to consider Phillips' habeas petition now, he might be forced to wait a further indeterminate period of time before he could raise any federal challenge to the constitutionality of his conviction.

The prejudice inherent in such a delay is quite evident. For fifteen years, Phillips has been compelled to remain in prison

under a possible sentence of death while being denied the opportunity to establish the unconstitutionality of his conviction. In addition, during so long a delay, there is a substantial likelihood that witnesses will die or disappear, memories will fade, and evidence will become unavailable. In short, the opportunity for a fair retrial diminishes as each day passes.

2. *Balancing Jurisprudential Concerns and Phillips' Constitutional Right*

[8] Balanced against the significant harms that may arise from further delay are relatively weak jurisprudential concerns. Comity concerns in this case are practically nonexistent since the state has had a full and fair opportunity to review the validity of Phillips' conviction and its decision regarding that conviction is final. *Cf. Hendricks v. Zenon*, 993 F.2d 664, 672 (9th Cir. 1993). Moreover, ordinary concerns for judicial efficiency are not present here; there is little risk of duplicative review since, unlike other types of criminal proceedings, any claims that Phillips might bring regarding his sentence will involve a review of an entirely separate trial and appeal under California's bifurcated system. Finally, while there is some danger that our holding might increase the risk of piecemeal litigation, even that concern is lessened by the fact that we do not know whether a death sentence will ultimately be affirmed by the state supreme court and thus whether there will ever be any ground on which a separate petition could be filed. *See supra* pp. 5805-06 n.2.

3. *The State's Argument Regarding the* Sherwood *Decision*

According to the state, Phillips must remain incarcerated for an indefinite period of years (quite possibly 20 or more) before he can seek federal review of his conviction. Indeed, the state maintains that such a rule is mandated by this court's decision in *Sherwood v. Tomkins*, 716 F.2d 632 (9th Cir. 1983), in which we held:

> When, as in the present case, an appeal of a state criminal conviction is pending, a would-be habeas corpus petitioner must await the outcome of his appeal before his state remedies are exhausted, even where the issue to be challenged in the writ of habeas corpus has been finally settled in the state courts.

Sherwood, 716 F.2d at 634.

[9] We find the state's argument to be unconvincing. First and most important, we have explicitly rejected the precise argument made by the state regarding the scope of the *Sherwood* holding in *Coe v. Thurman*, 922 F.2d 528 (9th Cir. 1991). In *Coe*, we held that extending the rule articulated in *Sherwood* to cases in which a substantial delay occurred during the state appellate process would directly contravene the language of section 2254, which eliminates the exhaustion requirement in cases in which there exist "circumstances rendering such process ineffective to protect the rights of the prisoner." *Coe*, 922 F.2d at 530 (quoting 28 U.S.C. § 2254). For this reason, we rejected the expansive interpretation of *Sherwood* that the state now urges us to adopt, holding that extraordinary delay in the state appellate process may excuse a failure to exhaust state remedies. As in *Coe*, we conclude that the delay in this case has rendered the state corrective process "ineffective" within the meaning of 28 U.S.C. § 2254(b).

Second, *Sherwood* is easily distinguishable. Our decision in that case rested upon the fact that the pending state appeal might result in the reversal of the petitioner's conviction and eliminate the federal question, *Sherwood*, 716 F.3d at 634, thereby rendering any decision by us moot and wasting precious judicial resources. In this case, there is no danger that the pending state appeal will moot our decision since it concerns the sentence, not the conviction underlying it.

The distinction we draw above is supported by our decision in *Blazak v. Ricketts*, 971 F.2d 1408 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 1866 (1994). In determining whether a district court's holding was a final, reviewable decision, we concluded that a habeas petition concerning a sentence where the issues surrounding the conviction are unresolved is distinguishable from a habeas petition concerning a conviction where the sentencing issues are unresolved. In agreeing to consider a habeas petition challenging a conviction even though the sentencing issues remained unresolved — and thus declining to follow the rule articulated by the Eleventh Circuit in *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992) (en banc), regarding habeas appeals with unresolved claims — we noted:

> In *Clisby* [where the court declined to consider a habeas petition], the district court granted relief as to the imposition of a sentence of death, but reserved judgment on claims going to the underlying conviction. As a result, the conviction issues remained alive and unresolved regardless of whether the court of appeals affirmed or reversed the district court's decision on the penalty issues. . . . Unlike *Clisby*, however, in the present appeal we have a complete resolution of all of the alleged constitutional infirmities arising from the relevant set of operative facts relative to conviction. This decision renders the sentencing issues moot. . . . Thus, unlike *Clisby*, if we affirm, the habeas corpus action is completed.

Blazak, 971 F.2d at 1413 (citations omitted).

Moreover, a decision to extend *Sherwood* to an unusual case like this one might raise concerns somewhat analogous to those outlined by the Supreme Court in *Corey v. United States*, 375 U.S. 169 (1963). In reviewing a statute that enabled a court to hold a defendant in prison while it obtained more detailed information to determine the appropriate sentence, the Court held that the prisoner could appeal his con-

viction immediately or wait until the final sentence was imposed before appealing. It noted that a rule requiring the defendant to wait until the final sentence was imposed before appealing "would . . . forestall any opportunity of a prompt appeal from an underlying criminal conviction . . . [and] the imposition of such a mandatory three- or six-month term of imprisonment before the defendant could file an appeal might raise constitutional problems of significant proportions." *Corey*, 375 U.S. at 173.[8]

4. *The Seventh Circuit's Decision*

Finally, we note that our holding in this case is hardly a novel one. Indeed, the Seventh Circuit has recently reached precisely the same result in an almost identical case. In *Burris v. Farley*, 1995 U.S. App. LEXIS 6225 (7th Cir. Mar. 29, 1995), the Seventh Circuit entertained a habeas petition by a defendant who had fully exhausted state remedies with regard to his conviction but whose sentence was not final at the time he filed the petition. In concluding that the petitioner's failure to exhaust state remedies with regard to his sentence did not preclude it from reaching the merits of his collateral attack upon his conviction, the court held:

> When a state handles his case in a glacial fashion, a prisoner need not wait for global warming to set in. The extended proceeding needed to fix the penalty for murder need not imply that a person with a colorable claim of innocence must cool his heels in prison for a decade or more before being entitled to present to a federal court his challenge to the judgment of conviction.

Burris, 1995 U.S. App. LEXIS 6225, at *4. Although we prepared our opinion prior to receipt of the Seventh Circuit's, we

[8]We also note that *Sherwood* did not involve a death penalty case or the bifurcated process that is applicable in such cases. *See supra* note 2.

could not have summarized our conclusion here in a more concise, or more colorful, fashion than did our fellow circuit.

CONCLUSION

[10] Our decision in this case is a narrow one. We simply hold that Phillips should not be required to wait more than fifteen years for his sentence to be finally resolved before he may challenge the constitutionality of his conviction. We are fully aware of the jurisprudential concerns implicated by our decision, but conclude that they are outweighed by Phillips' interest in a prompt resolution of his constitutional claims. We do not intimate any view as to what other circumstances, if any, might entitle a defendant to seek review of his conviction prior to his sentence becoming final. We are convinced, however, that fifteen years, with no end in sight, is simply too long a period to require a prisoner to await review of what might be an unconstitutional conviction, merely because an entirely separate and independent review of his sentence has not been resolved in a timely fashion. As we noted in *Blazak*:

> [U]nlike habeas grants exclusively on sentencing issues, the grant of a habeas petition because of the constitutional invalidity of a conviction raises concerns that a possible innocent person has been unjustifiably incarcerated on death row for a number of years. *Delaying retrial in such cases, while attorneys fight over a sentence that may no longer exist, risks the perpetuation of a monumental injustice should retrial ultimately result in an acquittal.*

Blazak, 971 F.2d at 1414 n.7 (emphasis added).

[11] For the above reasons, we reinstate the petition. The district court's decision is

REVERSED AND REMANDED.

KLEINFELD, Circuit Judge, concurring:

I concur. My analysis differs in two respects, on abstention and on our purporting to make a holding in a case not before us.

The majority concludes that *Younger v. Harris*, 401 U.S. 37 (1971), "is inapplicable," and analyzes the case in terms of "prudential concerns." In my view, *Younger* applies, but contains an equitable exception for cases like this one.

The majority analyzes much of the case in terms of *Rose v. Lundy*, 455 U.S. 509 (1982). This case is not a *Rose* problem. *Rose* holds that federal courts should dismiss mixed petitions. This is not a mixed petition. The state does not argue that Phillips has included any claims not exhausted in state court in his petition.

In *Younger*, the Supreme Court held that federal courts generally may not enjoin ongoing state criminal proceedings, but leaves room for possible exceptions to the general rule for "bad faith, harassment, or other unusual circumstance that would call for equitable relief." *Id.* at 54. *Younger* abstention applies to collateral attacks on convictions as well as petitions for injunctions. *See Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 489 (1973). The doctrine generally bars habeas corpus petitions in federal court even where the conviction has been affirmed through all available levels of direct review in the state courts, so long as finality has not yet been achieved regarding the sentence. *Cf. Berman v. U.S.*, 302 U.S. 211, 212 (1937)("Final judgment in a criminal case means sentence. The sentence is the judgment."); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975) ("Virtually all of the evils at which *Younger* is directed would inhere in federal intervention prior to the completion of state appellate proceedings, just as surely as they would if such intervention occurred at or before trial."); 28 U.S.C. § 2254 ("in custody pursuant to a judgment of the State court").

We have held that "[w]hen, as in the present case, an appeal of a state criminal conviction is pending, a would-be habeas corpus petitioner must await the outcome of his appeal before his state remedies are exhausted, even where the issue to be challenged in the writ of habeas corpus has been finally settled in the state courts." *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983). *See also Drury v. Cox*, 457 F.2d 764, 764-65 (9th Cir. 1972)("Our reading of *Younger v. Harris* convinces us that only in the most unusual circumstances is a defendant entitled to have federal interposition by way of injunction or habeas corpus until after the jury comes in, judgment has been appealed from and the case concluded in state courts. Apparent finality of one issue is not enough." (citation omitted)); *Hillery v. Pulley*, 733 F.2d 644 (9th Cir. 1984) (affirming *Hillery v. Sumner*, 496 F. Supp. 632, 637 (E.D. Cal. 1980)).

Younger abstention is an equitable doctrine, and leaves room for an exception for "unusual circumstance that would call for equitable relief." *Younger*, 401 U.S. at 54. In the case at bar, Phillips' confinement apparently began in 1978 when he was arrested, yet by 1992, fourteen years later, when he filed his petition for habeas corpus, the state had not yet issued a final judgment in his case. This delay, combined with California's bifurcation of the guilt phase and the penalty phase of the proceeding, and the finality of the state adjudication of guilt which is the only subject of the petition, allow for application of "unusual circumstances" exception in *Younger*. The "policy against federal interference with state criminal prosecutions," *Younger*, 401 U.S. at 46, is not implicated, because federal habeas corpus review of the guilt phase will not interfere at all with anything remaining for adjudication in the state courts.

So long a delay between the beginning of confinement and finality is, in *Younger* terminology, "unusual." I agree with the majority that the unusual circumstances in this case allow for the equitable relief of permitting Phillips to petition for a

writ of habeas corpus now, instead of waiting for the state to achieve finality on his sentence. Likewise, the habeas statute includes an exception at 28 U.S.C. § 2254(b) for "absence of available State corrective process or the existence of circumstances rendering such process ineffective." The circumstances allow application of this exception. *See Coe v. Thurman*, 922 F.2d 518 (9th Cir. 1990).

I do not think we have the power to hold, as the majority opinion purports to do at footnote 2, that if Phillips files a subsequent petition attacking his sentence, he will have demonstrated "good cause" for filing more than one petition. *See McCleskey v. Zant*, 499 U.S. 467 (1991). My disagreement on this point has to do with what the terms "holding" and "dictum" mean, not with whether Phillips will have had "good cause." I am inclined to agree with the majority that if Phillips subsequently files a petition challenging his sentence, when it becomes final, he will have "good cause" for not having joined that claim with his attack on his conviction. My objection to calling this appraisal, upon which all three of us agree, a holding, is that it disposes of no issue before us, so is dictum no matter what we call it. A court can only decide the case before it. Claiming that a proposition is holding does not make it so.

An abuse of the writ case does not arise until the subsequent petition is filed. *See e.g., Burris v. Farley*, 1995 U.S. App. Lexis 6225 at *7 (7th Cir. March 28, 1995) (petitioner "must meet that defense if and when the state interposes it."). An appellate court cannot command itself to render particular decisions in subsequent cases. Stare decisis requires that like cases be decided alike. It does not enable a court to exercise power over its own judges in future cases by talking about something not dispositive of the case before it. We lack authority to decide the abuse of the writ case which may arise in the future, even though we all agree on how it should probably be decided.

I am puzzled about why the sides are reversed in this case. Usually the man sentenced to death prefers delay, the state, expedition. In this case, the man sentenced to death seeks to accelerate the final disposition in federal court of his petition for a writ of habeas corpus. I am unable to see the harm to the interests of the State of California in granting him this relief.

The writ of habeas corpus is the great writ for testing the constitutionality of confinement. The writ is severely impaired, if confinement may last fourteen years, yet not be ripe for a habeas petition. I agree that this petition should now be entertained.

ATTORNEY GENERAL'S
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DEPARTMENT OF JUSTICE
SACRAMENTO OFFICE

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No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX B

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RICHARD LOUIS ARNOLD PHILLIPS, Petitioner, vs. M.A. HAHN, DIRECTOR, MADERA COUNTY DEPT. OF CORRECTIONS, Respondent.	No. CV-F-92-5167 REC DEATH PENALTY CASE ORDER

In 1980, the petitioner was convicted of two counts of robbery, one count of attempted murder, and one count of murder with the special circumstance of murder in the commission of a robbery. On February 20, 1980, the court sentenced the petitioner to death. People v. Phillips, 41 Cal.3d. 29, 38-39 (1985). On automatic appeal, the California Supreme Court affirmed the judgment on the guilt phase and finding of special circumstances, but reversed the judgment on the penalty phase and remanded the case for a new penalty

trial. Id. at 84.

The petitioner's penalty retrial commenced on September 23, 1991. On November 6, 1991, the jury returned a verdict of death. The petitioner's formal sentencing is scheduled for March 13, 1992, in the Madera County Superior Court. Hence, the petitioner's state court proceedings are ongoing.

On March 4, 1992, the petitioner, proceeding pro se, filed a petition with this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, an application to proceed in forma pauperis, and an application for a stay of any further proceedings in the Madera County Superior Court. A state prisoner's sole remedy to challenge the constitutionality of his confinement is habeas corpus. Preiser v. Rodriguez, 411 U.S. 475, 499-500 (1973); Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 681 (9th Cir. 1984). Here, however, the petitioner, in his application for a stay of the state court proceedings, challenges the conditions of his

confinement on death row. Such an application id not properly before this court. Recourse for the type of injury of which the petitioner complains can be obtained by filing an appropriate action in the proper federal district court.

This court declines to interfere with the ongoing state criminal proceedings on abstention grounds. See Younger v. Harris, 401 U.S. 37 (1971); see also Huffman v. Pursue, Ltd., 420 U.S. 592, 609 (1975) (the rationale of Younger applies throughout appellate proceedings). Where a district court finds Younger abstention appropriate as to a request for declaratory or injunctive relief, the court may not retain jurisdiction, but should dismiss the action. Juidice v. Vail, 430 U.S. 327, 348 (1977) (Stewart, J., dissenting).

Furthermore, a prisoner in state custody is required to exhaust state judicial remedies by affording the highest state court a fair opportunity to rule on the merits of the claims prior to bringing those claims to the federal courts. 28 U.S.C. § 2254 (b)-(c); Rose v. Lundy, 455 U.S. 509 (1982).

In the present case, although the petitioner alleges his guilt phase claims have been exhausted, his death sentence has not yet been imposed or reviewed by the state courts.

ACCORDINGLY IT IS ORDERED that the petition for writ of habeas corpus is DISMISSED WITHOUT PREJUDICE. IT IS FURTHER ORDERED that the petitioner's application for a stay of the Madera County Superior Court proceedings is DENIED. The court declines to rule on the petitioner's application to proceed in forma pauperis.

DATED: March 12, 1991

s/ Robert E. Coyle
Robert E. Coyle
UNITED STATES DISTRICT JUDGE

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX C

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RICHARD LOUIS ARNOLD PHILLIPS,	)	No. CV-F-92-5167-REC-P
Petitioner,	)	
vs.	)	DEATH PENALTY CASE
DANIEL VASQUEZ, Warden, San Quentin State Prison,	)	ORDER
Respondent.	)	

Petitioner, a state prisoner proceeding pro se, has timely filed a notice of appeal of this court's denial, without prejudice, of his application for writ of habeas corpus. Before the petitioner can appeal this decision, this court must issue a certificate of probable cause. Although the petitioner has failed to accompany his notice of appeal with an application for a certificate of probable cause, pursuant to Federal Rule of Appellate Procedure 229(b), this court will consider whether to issue a

certificate.

A certificate of probable cause should be granted only if the petitioner seeks to present a "substantial question" on appeal. See Gardner v. Pogue, 558 F.2d 548, 551 (9th Cir. 1977). An examination of the record reveals that the petitioner has failed to raise a "substantial question" on appeal.

For the aforementioned reason and those set forth in the order dismissing the petition for writ of habeas corpus without prejudice, IT IS ORDERED that certification of the appeal is DENIED.

DATE: 5-14-92

s/ Robert E. Coyle
Robert E. Coyle
UNITED STATES DISTRICT JUDGE

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF REVERSAL BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (BETTY B. FLETCHER, STEPHEN REINHARDT, AND ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX D

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS	)	No. 92-15828
Petitioner,	)	DC No. CVF92-5167-REC-P
v.	)	ORDER
DANIEL B. VASQUEZ, Warden, San Quentin State Prison,	)	
Respondent.	)	

Before: FLETCHER, Circuit Judge.

The request for a certificate of probable cause is granted.

(Filed June 18, 1992
Cathy A. Catterson, Clerk
U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX E

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,	)	NO. 92-15828
Petitioner/Appellant,	)	DC# CV-92 05167-REC
vs.	)	
DANIEL VASQUEZ, Warden,	)	ORDER
Respondent/Appellee.	)	

Before: FLETCHER, Circuit Judge

Appellant's motion to proceed on appeal in forma pauperis is granted.

The schedule for briefing this case will be as follows: The appellant's opening brief of no more than 75 pages shall be filed by October 13, 1992. The appellee's brief of no more than 75 pages shall be filed by November 30, 1992 and appellant's reply brief of no more than 35 pages shall be filed by December 21, 1992.

Upon completion of the briefing, the parties will be notified as to the scheduled date of calendaring or submission.

(Filed Aug. 26, 1992, Cathy Catterson, Clerk, U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX F

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,	)	No. 92-15828
Petitioner,	)	DC# CVF92-5167 REC-P
v.	)	ORDER
DANIEL B. VASQUEZ, Warden San Quentin State Prison,	)	
Respondent.	)	

Before: FLETCHER, REINHARDT, and KLEINFELD, Circuit Judges

Donald J. Horvath, Attorney at law, 6592 North First Street, Fresno, CA 93710 is appointed as advisory counsel for petitioner. 18 U.S.C. § 3006A. The Clerk of Court will prepare and forward to Mr. Horvath the necessary CJA 20 form.

In light of the fact that the district court declined to issue a certificate of probable cause to appeal, the court directs counsel as a preliminary matter to review court records and Mr. Phillips' files to determine, in counsel's view, whether Mr.

Phillips has exhausted his state remedies. Counsel shall file a brief with this court within sixty (60) days from the date of this order, reporting his findings and rationale as to whether this appeal should be dismissed and the case remanded to state court for exhaustion of remedies. Petitioner may have exhausted state claims in respect to his conviction, but not his sentencing. It is possible that a final judgment may be lacking and that there may be issues related to sentencing that are unexhausted. At their option, Mr. Phillips and the State of California, or either of them, may respond within twenty-one (21) days of the date of service upon them of said brief, expressing agreement or disagreement with the recommendations, giving reasons.

(FILED Oct. 1, 1992
Cathy Catterson, Clerk
U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF REVERSAL BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (BETTY B. FLETCHER, STEPHEN REINHARDT, AND ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX G

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,	)	No. 92-15828
Petitioner,	)	DC No. CVF92-5167-REC-P
v.	)	ORDER
DANIEL B. VASQUEZ, Warden, San Quentin State Prison,	)	
Respondent.	)	

Before: FLETCHER, Circuit Judge.

The briefing schedule contained in the August 26, 1992 order is vacated. The operative briefing schedule is contained in the October 1, 1992 order that appoints advisory counsel.

(FILED Oct. 16, 1992
Cathy Catterson, Clerk
U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX H

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS	)	No. 92-15828
Petitioner,	)	DC No. CVF92-5167-REC-P
v.	)	ORDER TO SHOW CAUSE
DANIEL B. VASQUEZ, Warden, San Quentin State Prison,	)	
Respondent.	)	

Before: FLETCHER, REINHARDT, and KLEINFELD, Circuit Judges.

Donald J. Horvath, advisory counsel for Richard Phillips, acting pro se, and the Attorney General of California, each is required to respond to the following:

(1) Each shall report on the status of any proceedings in respect to Richard Phillips convictions and sentence of death pending in the courts of the State of California.

(2) Why should not this appeal be dismissed without prejudice as premature in that all proceedings in the state court had

not been exhausted as of the time the petition was filed?

(3) Why should not Richard Phillips make application in the state court for any materials, computer, investigations, etc. needed in aid of his appeals and habeas corpus review until a petition for habeas corpus is properly before this court?

Responses shall be filed within thirty (30) days of the date of this order.

(FILED Dec. 2. 1993
Cathy A. Catterson, Clerk
U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX I

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS, Petitioner, v. DANIEL B. VASQUEZ, Warden, San Quentin State Prison, Respondent.	)	No. 92-15828 DC No. CVF92-5167-REC-P ORDER

Before: FLETCHER, Circuit Judge.

The time for oral argument in this matter is changed and the case will now be heard at **8:00 a.m. on October 11, 1994** in San Francisco, California. To insure that he is present and ready to participate in the proceedings, prison officials are to arrange to have the petitioner near the telephone where the court may reached him no later than **7:45 a.m. on Tuesday, October 11, 1994.**

(FILED Sept. 23, 1994
Cathy Catterson, Clerk
U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
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PETITION FOR WRIT OF CERTIORARI

APPENDIX J

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,	)	No. 92-15828
Petitioner,	)	DC No. CVF92-5167-REC-P
v.	)	ORDER
DANIEL B. VASQUEZ, Warden, San Quentin State Prison,	)	
Respondent.	)	

Before: FLETCHER, REINHARDT, KLEINFELD, Circuit Judges.

The appellant, Richard Louis Arnold Phillips, is directed to file a response to the appellee's petition for rehearing and suggestion for rehearing en banc filed with the court. The response shall be filed by advisory-counsel. In addition, Mr. Phillips may, if he so elects, file an additional response separately. Responses shall be filed within twenty-eight days from the date

of this order. No response shall exceed fifteen pages.

(FILED June 30, 1995
Cathy Catterson, Clerk
U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

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RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

APPENDIX K

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,	)	No. 92-15828
Petitioner,	)	D.C. No. CIV-F-92-5167-REC-P
v.	)	ORDER
DANIEL B. VASQUEZ, Warden, San Quentin State Prison,	)	
Respondent.	)	

Before: FLETCHER, REINHARDT, and KLEINFELD, Circuit Judges.

Respondent's Motion to Lodge Documents is DENIED.

(FILED Aug. 7, 1995
Cathy Catterson, Clerk
U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX L

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,	)	No. 92-15828
Petitioner-Appellant,	)	D.C. No. CIV-F-92-5167-REC-P
v.	)	ORDER
DANIEL B. VASQUEZ, Warden, San Quentin State Prison,	)	
Respondent-Appellee.	)	

Before: FLETCHER, REINHARDT, KLEINFELD, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

(FILED Sept. 14, 1995
Cathy Catterson, Clerk
U.S. Court of Appeals)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

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CAPITAL CASE
IMMEDIATE STAY REQUESTED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD LOUIS ARNOLD PHILLIPS, Petitioner, vs M.A. HAHN, DIRECTOR, MADERA COUNTY DEPT. OF CORRECTIONS, Respondent.	)	NO:

PETITION FOR WRIT OF HABEAS CORPUS

RICHARD LOUIS ARNOLD PHILLIPS
In propria persona
Donald J. Horvath, Esq. &
Barry F. Nix, Esq.
Advisory Counsel
14191 Road 28
Madera, CA 93638
(209) 673-1040

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Richard Louis Arnold Phillips, proceeding in *propria persona,* files this petition for writ of habeas corpus pursuant to 28 U.S.C. section 2254, *et seq.,* and alleges as follows:

1. Petitioner Richard Louis Arnold Phillips (Phillips) is confined at the Madera County Jail by M.A. Hahn, Director of the Madera County Department of Corrections, pursuant to a judgment of conviction entered by the Madera County Superior Court in Action No. 4852.

2. Petitioner was convicted upon his plea of not guilty in Madera County Superior Court Action No. 4852. The case was tried to a jury starting on 22 January 1980. Phillips was found guilty of the murder of Bruce Bartulis (Bartulis) with special circumstances (murder during perpetration of a robbery), the attempted murder of Ron Rose (Rose), and robbery, all while personally using a firearm.

Petitioner presented a false alibi defense at his trial. Petitioner testified that he was not present at the crime scene where Bartulis was killed. In fact, petitioner was present at the crime scene and did shoot Bartulis.

3. On 20 February 1980, petitioner was sentenced to death.

4. Petitioner's automatic appeal of the death sentence was decided by the California Supreme Court. On 31 December 1985, the Supreme Court reversed the death penalty and affirmed petitioner's convictions upon the guilt phase and finding of special circumstances in Action No. 21372 reported at *People v. Phillips* (1986) 41 Cal.3d 29, 84, 222 Cal.Rptr. 127.

5. In addition to the automatic appeal, Phillips has previously filed other actions attacking this judgment, as described in paragraph 6.

6. Further proceedings in the California courts were as follows:

A. Petitioner filed his first habeas corpus petition in the Madera County Superior Court on or about 8 April 1988. The petition was numbered 4852, which is the number of the murder prosecution in which petitioner was convicted and sentenced to death.

This petition asserted that trial attorney Paul R. Martin[1] (Martin) was ineffective because he did not know the number of peremptory jury challenges in a capital murder case and because he did not make a motion to set aside the information pursuant to Penal Code section 995.

An evidentiary hearing was held upon the petition on 1B November 1988 before Judge Bert Bailey, assigned.

The petition was denied on 4 January 1989.

Petitioner has abandoned the points raised in this first habeas corpus petition.

---

[1] Paul Martin was Phillips' trial attorney during the guilt and penalty phase of the 1980 trial.

B. On or about 18 November 1988, Phillips filed a second habeas corpus petition in the Madera County Superior Court.[2]

In this second petition, Phillips asserted that the prosecutor failed to divulge material evidence of obvious exculpatory value to the defense, including but not limited to evidence of a shoot-out between Phillips and Rose -- i.e., Sergeant Fore's 30 December 1977 report and the 28 December 1977 transcript of a law enforcement interview with Sharon Lynn Colman (Colman), Phillips' co-defendant and the state's star witness.

In this petition, petitioner also raised the point that the Madera County District Attorney David Minier (Minier) knew or should have known that Colman was lying when she testified she did not have a deal for her testimony against

---

[2] Prior to submitting this writ of habeas corpus Phillips filed a Motion for Confidentiality with the Madera County Superior Court, which was denied through the California Supreme Court.

Phillips and failed to correct Colman's false testimony.

On 6 January 1989, Judge Bailey (assigned) issued an order to show cause upon the 18 November 1988 petition.

The prosecutor filed points and authorities in opposition to the petition supported by a declaration of prosecutor Minier Petitioner filed a traverse to the opposition.

A hearing upon the petition was held on 4 and 5 January 1990 before Judge W.J. Harpham, assigned.

On 14 February 1990, a formal order denying the petition was filed. (Exhibit 1.) The denial order reads as follows:

> "The Writ of Habeas Corpus come on for hearing January 4 and January 5, 1990 for evidentiary hearing pursuant to previous order therefor issued by Judge Bert B. Bailey on July 12, 1989.
>
> "Oral documentary evidence was introduced; the court took judicial notice of all declarations and all proceedings held in this case. This included, among other things, the transcript of the preliminary hearing, the trial transcript, the transcript of the hearing held on a previous Writ of Habeas Corpus on November

18, 1988 and the Supreme Court opinion in this case, 41 Cal.3d 29.

"Petitioner alleges in this writ that he should be granted a new trial on the guilt phase on the grounds that he was denied discovery and alleged presentation of false testimony of Sharon Colman knowingly produced by the district attorney.

"The defendant specifically asserts that he was denied discovery of the following evidence:

1. Tape recorded interview of Sharon Colman;

2. A list of 84 witnesses;

3. A police report about a "shootout";

4. A police report about Ron Rose's money;

5. Santa Maria Police Department reports.

"Defendant contends that neither he nor his attorney received before trial the transcript of the taped interview of Sharon Colman with the district attorney, Officer Flores, Officer Seymore and her attorney, Thomas C. Peterson.

"Paul Martin testified that he does not remember having the tapes or transcript and is certain he would have used it to discredit Sharon Colman's testimony, if he had had it. He also testified the same as to the list of 84 witnesses.

"Memories fade in ten years. Mr. Martin, now a superior court judge, has had many cases both as an attorney and as a judge since that time. He admittedly could not recall most details of his reasoning and which materials he had at the time of trial. The defendant testified November 18, 1988 during the hearing on the preceding Writ of Habeas Corpus that he heard the tapes before the trial in Superior Court. R. T. Nov. 18, 1988, pg. 95: L. 1-26; pg. 96: L. 1-24.

"If the defendant heard the tapes then so did Judge Martin. The method of numbering is also persuasive that Mr. Phillips and his attorney had the transcript of the tapes. Therefore, the court finds that defendant and Judge Martin did have the tapes before the trial. However, that is not actually of great importance since Colman's testimony in the preliminary hearing and trial was the same. Ms. Hart argues that there was one conflict in the transcript and her testimony. The conflict, if any, was insignificant and no prejudice could have ensued.

"The defendant further argues from testimony of Mr. Thomas Peterson that a deal was communicated to Sharon Colman and that the Supreme Court did not have that information before it when it decided the case. Peterson testified that even though Sharon Colman accepted the deal he never assured her it was irrevocable, i.e., it could be changed. He represented Sharon Colman only about two months at which time she hired Cassandra Dunn to represent her. Cassandra Dunn testified at the

trial that there was no deal communicated to Sharon Colman. This was about sixteen months after the tapes were made and after Peterson was replaced. She was not called nor impeached by any competent evidence.

"Judge Martin in closing arguments talked about a Ideals; he argued blackmail by the district attorney in holding a first degree murder charge over Colman's head. Clearly her credibility because of a 'deal,' and a pending murder charge was put before the jury, and, as stated by the Supreme Court, the jury had sufficient facts with which to evaluate Sharon Colman's testimony.

"If there was a plea bargain communicated to Sharon Colman it was, in the court's opinion, not prejudicial beyond a reasonable doubt. Certainly it would not have even come close to changing the result.

"The list of 84 witnesses is a non issue. Judge Martin testified he received a list of witnesses before the trial but that he didn't remember it being that many witnesses. At the trial, Reporter's Transcript on Appeal, Vol. II, pg. 511: L. 12-15, Mr. Martin stated to the trial court that he received a list of 200 witnesses. Therefore that is a closed issue and could not have affected the result anyway.

"The court finds that the defense did have the police report about the so called Shootout told to a Doctor Reville by Sharon Colman

(Petition for Writ, Exhibit C. l. Sgt. Fore's Police Report dated 12/30/77). It was available to the defense. It is not surprising that it was not pursued in view of the theory of defense, namely, alibi. By hindsight defendant may wish he had used a different defense. Also if you read Sharon Colman's testimony together with other evidence there is no foundation to support her alleged statement to Dr. Reville. The court finds beyond a reasonable doubt that it was not prejudicial.

"The existence of S162.00 on the victim is also a non issue. There was a picture of burned money presented to the jury and counsel for defendant clearly understood that substantial money remained on the victim Ron Rose. It could have been argued any way defendant chose. It is the court's recollection that it was not argued by the defense.

"The court further finds that the police report consisting of 11 pages from the Santa Maria Police Department was furnished to defendant's counsel.

"The court is satisfied that the defendant received a fair trial during the guilt phase; that he received due process. The court finds that any error committed was harmless beyond a reasonable doubt and therefore orders the Writ of Habeas Corpus filed November 18, 1988 to be denied."

Dated 8 February 1990, signed by the Honorable W.J. Harpham, Judge Assigned. (Exhibit 1.)

C. On 10 August 1990, Phillips filed a third petition for writ of habeas corpus in the Fifth District Court of Appeals (F014410) attacking the denial by the superior court of his second habeas corpus petition.

In this third petition, Phillips urged that the superior court had erred in its findings by failing to credit attorney Martin's testimony that he had not received the exculpatory evidence because any competent attorney who had such evidence would have used it at trial and attorney Martin did not present the shoot-out evidence or theory at Phillips' guilt trial.

In the alternative, petitioner urged that if attorney Martin had received the exculpatory shoot-out evidence as the superior court had found in the habeas corpus proceeding, attorney Martin was constitutionally ineffective for failing to use the shoot-out evidence at Phillips' trial.

Petitioner relied upon attorney Martin's testimony in the superior court habeas corpus hearing that he would have presented evidence of a shoot-out as an alternative defense at Phillips' guilt trial to rebut the possibility that the failure to present a shoot-out theory at trial resulted from a tactical decision.

Petitioner further urged that if the testimony of defense attorney Peterson is credited, both District Attorney Minier and Colman testified falsely at Phillips' trial regarding Colman's knowledge of her receipt of consideration from the prosecutor in return for her testimony against Phillips.

On 16 August 1990, the Fifth District Court of Appeals issued a stay order on the pending penalty phase trial.

The California Attorney General filed a response which included a declaration from attorney Martin (Exhibit 2) retracting his prior testimony at the habeas corpus hearing relied upon by Phillips in his third petition. Contrary to his testimony at the evidentiary hearing upon the second petition,

attorney Martin stated in this declaration that he would not have presented evidence of a shoot-out as an alternative defense at trial. However, attorney Martin repeated in this declaration his prior testimony that he did not in fact receive the shoot-out evidence from the prosecutor.

The Attorney General's Response also included a declaration of Colman stating there was not a shoot-out between Phillips and Rose and that she made the statements to Dr. ReVille which indicated that there was a shoot-out because Phillips told her to do so.

Petitioner filed a traverse.

On 9 May 1991 the Fifth District Court of Appeals denied the petition for writ of habeas without opinion and vacated its stay order.

D. About 20 May 1991, Phillips filed a Petition for Review of the Fifth District's denial of his third habeas corpus petition in the California Supreme Court.

In his petition for review, Phillips urged that the Court of Appeal erred in concluding that attorney Martin effectively represented Phillips in his capital murder trial because Martin (1) failed to present an alternative defense to the special circumstance allegations of murder in the perpetration of robbery based upon evidence that Phillips did not kill to rob the victims and (2) failed to present an alternative defense based upon a shoot-out between Phillips and the victims.

Phillips also urged in this petition that the Court of Appeal should have ordered an evidentiary hearing before resolving critical factual issues against him based upon new declarations filed in the Court of Appeal.

On about 17 July 1991, the petition for review was denied without opinion or hearing.

E. On 16 August 1991, Phillips filed a fourth habeas corpus petition was in the Madera County Superior Court.

This petition raised the following issues:

(1) Trial counsel Paul R. Martin provided constitutionally ineffective assistance of counsel because he failed to present the defense at trial that Phillips did not commit a murder in the perpetration of a robbery as required for the jury to find the only alleged special circumstance to be true. Petitioner urged that attorney Martin should have argued that even if the jury decided that Phillips shot the victims, the prosecution evidence also shows that his crime was robbery incidental to a murder rather than a murder in the perpetration of robbery.

(2) Trial counsel Paul R. Martin provided constitutionally ineffective assistance of counsel because he failed to discover or use in his investigation of Phillips' case and trial the fact that the police autopsy photographs, which were provided to attorney Martin, show that the homicide victim Bartulis was shot either from his lower left or upper right. From either angle, Phillips could not have shot Bartulis from the position in which prosecution witnesses put him when

Bartulis was shot, and, therefore, the actual shot which killed Bartulis was fired by Rose.

(3) The people in bad faith allowed the destruction of material physical evidence--the vehicle in which the victims were shot. The victim's truck had obvious exculpatory value that was apparent prior to its destruction.

On 30 August 1991, the trial court entered a minute order denying the fourth habeas corpus petition which reads as follows:

> "In considering the above Writ of Habeas Corpus the Court takes judicial notice of the transcript of the preliminary examination, the jury trial and the transcript of the Writ of Habeas Corpus in the Superior Court before Judge Bert Bailey. The Court also considered evidence of the preceding on the Writ of Habeas Corpus conducted before this Court on or about January 4, 1990.
>
> "In addition to the foregoing, this court considered the points and authorities filed by each side in the proceeding on the Writ of Habeas Corpus before the Court of Appeal, Fifth District. Finally, the Court considers the points and authorities, and arguments presented by petitioner in the present proceeding.

"Petitioner's latest writ is predicated on the theory that he received ineffective assistance of counsel for, among other things, failure to investigate and use facts arising from the trajectory of bullet entry Petitioner asserts that this issue has not previously been presented nor ruled upon because he was prevented from inspection of the victim's vehicle which might have shown bullet impressions/trajectory.

"The Court is satisfied that this latest theory as to ineffective assistance of counsel has, along with other theories advanced by petitioner, been ruled upon either directly or impliedly by the three levels of courts to which writs have heretofore been directed.

"The Court also finds, however, that there is no credible evidence that law enforcement or the District Attorney's office destroyed the victim's vehicle in bad faith or that it would be likely to change the result or support the defendant's the case any more than argued at the trial regarding the angle and entry of the bullet as to Bartulis. The exculpatory value the evidence must be apparent before the evidence is destroyed. It must be shown that the police/District Attorney knew the evidence would exculpate defendant when they failed to preserve the evidence in question. (Footnote pg. 336, Arizona v. Youngblood - 109 S.Ct. 333 [1988]).

"Therefore, pursuant to rule 260(e) of the Superior Court the writ of habeas corpus filed August 16, 1991 is hereby denied and request

for stay of pending trial is denied."

DATED: August 30, 1991 (Signature)

F. On about 13 September 1991, Phillips filed his fifth petition for writ of habeas corpus in the Fifth District Court of Appeals (F016599).

In his fifth petition, Phillips urged that the superior court had erred in its factual findings, that Phillips had made a prima-facie case for relief in the superior court, and that the issues had not been raised in prior petitions as the superior court had found.

On 18 September 1991, the Court of Appeal denied the fifth petition without opinion or hearing.

G. On about 18 September 1991, Phillips filed his sixth petition for writ of habeas corpus as an original proceeding in the California Supreme Court. This petition was basically the same as the fifth petition filed in the Court of Appeal described in Item F above.

On 23 September 1991, the petition was denied without opinion or hearing.

7. A partial explanation for-the complexity of the state habeas corpus proceedings follows:

The assertion that attorney Martin was ineffective for failing to attack the special circumstance allegation was first clearly raised in Phillips' Petition for Hearing in the California Supreme Court. There was no apparent need for this assertion until attorney Martin filed a declaration as part of Respondent's Opposition in the Fifth District Action No. F014410. In his declaration, attorney Martin recanted his sworn testimony given on 4-5 January 1990 to the effect that he would have presented a shoot-out defense if he had received evidence to support such a defense.

Presentation of the autopsy evidence issue was delayed for the following reasons:

Petitioner personally reviewed numerous photos, including those of the autopsy and of the vehicle, for the first

time in 1989. Prior to this, review of the photographs was conducted, if at all, by his various appointed counsel.

After petitioner took these photos back to his cell at San Quentin, he closely reviewed their contents, and discovered a disparity between the corner's testimony at his trial and what the photographs disclosed regarding the path of the bullet which killed Bartulis.

When petitioner brought this issue to the attention of his various appointed counsel, they each advised him that he should pursue the location of the vehicle to affirmatively establish the trajectory of the entry/exit wound in Bartulis.

Thereafter, petitioner actively attempted to determine the whereabouts of this vehicle because he knew that no counsel or investigator representing him had ever inspected the victim's vehicle.

Petitioner's efforts to locate the vehicle included filing a motion for discovery in Madera County Superior Court, tracking down disposition of the vehicle through the California

Department of Motor Vehicles, and locating the tow truck operator who moved this vehicle at the behest of Madera County law enforcement. All of this information was discovered after the Madera County District Attorney's office indicated to the court that it could not account for the disposition of the truck and related evidence.

8. On about 23 September 1991, jury selection for commenced for petitioner's penalty retrial before the Hon. W.J. Harpham, assigned by the Chairperson of the California Judicial Council. On 6 November 1991 the jury returned a recommendation of a sentence of death.

9. Petitioner filed a motion for a new trial based on new acts of prosecutorial misconduct. On 21 February 1992, the new trial motion was denied.

10. Petitioner is scheduled for formal sentencing on 13 March 1992.

11. The judgment convicting petitioner of murder with special circumstances is final in California courts. Petitioner

believes that he cannot obtain further review of the adjudication of guilt by either direct appeal of right or discretionary writ petition in California courts. (See, Declaration of attorney Donald Horvath, Exhibit 3, 1 6.) The only remaining California decision is whether I will be sentenced to death or life imprisonment without possibility of parole--the two possible sentences for the crime of which I stand finally convicted as to guilt.

12. A exhibits to this petition which are not original documents are true copies of the documents they purport to be.

CLAIMS FOR RELIEF

1. INTRODUCTION

Petitioner Richard "Speed" Phillips was convicted of murder and attempted murder of two Southern California building contractors Bruce Bartulis and Ronald Rose The prosecution's star witness was Sharon Colman. Colman was Phillips' girlfriend and was present at the crime scene.

Materials discovered after Phillips' automatic appeal disclose the following:

1. The prosecutor did not give Attorney Paul R. Martin Officer Fore's report and the 28 December 1977 Colman transcript (of her interview with law enforcement) before Phillips' guilt trial.

2. The prosecutor David Minier and his star witness Sharon Colman both testified falsely at Phillips' guilt trial.

3. Attorney Martin did not effectively represent Phillips in his capital murder case.

4. The prosecutor violated Phillips' right to due process of law by destroying material evidence -- the victim's truck -in base faith.

2. **CLAIMS**.

The grounds upon which Phillips contends he is being held unlawfully in violation of the Constitution of the United States are a, follows:

A. **The Prosecutor's Failure To Disclose Material Evidence With Obvious Exculpatory Value.**

Phillips' Fifth, Eighth and Fourteenth Amendment rights were Violated by the combined actions of the prosecutor and Madera County law enforcement in failing to comply with the trial court s discovery order.

The following facts support this claim:

1. Sharon Colman, the key prosecution witness, made a statement to Dr. Donald ReVille (ReVille), Phillips' brother-in-law, concerning the manner in which the shooting of the victims occurred. Dr. ReVille related this statement by Colman to Officer Fore of the Madera County Sheriff's office, who wrote a police report dated 30 December 1977 (Exhibit 4) which stated in part:

"On arrival at his office, Dr ReVille told R/O, when Colman talked to him earlier that week, she told him Richard Phillips replaced a window shield in the Brown Toyota. R/O asked the doctor how the front window was broken out. He explained, Sharon told him once they met the two other guys, *both parties shot at each other at the same time, shooting out the window shield on the Toyota.*" (Exhibit 4; emphasis added.)

2. Madera County law enforcement officials conducted a taped interview with Sharon Colman on 28 December 1977. (Exhibit 5.) In this interview, Colman made numerous statements that were contradictory to her subsequent testimony at petitioner's trial as shown in the attached brief.

The most important discrepancy is that in her 28 December 1977 statement, Colman said the first thing Phillips did after the shooting (except hitting Bartulis in the head with his gun) was to reach into the Ranchero and get Rose's gun. (Exhibit 5, pp. 73-74;; page references for this exhibit are to handwritten numbers in the lower right hand corner.) In her trial testimony Colman stated that the first thing Phillips did after the shooting (except hitting Bartulis in the head with his gun) was to reach into the Ranchero and remove the wallet of Bartulis.

The fact that after the shootings petitioner first reached for Rose's gun supports a shoot-out theory of the crime. However, the fact that petitioner first reached for the victim's

wallet would support the prosecutor's theory that the killing was for purpose of robbery.

3. These reports were never made available to the defense. (First Declaration of Attorney Paul Martin (Exhibit 6) ¶ 6; Exhibit 2 ¶¶ 4, 5; Declaration of Phillip Gerkhe (Exhibit 7) ¶ 3.)

4. The Prosecutor and Madera County Law Enforcement deliberately destroyed the victim's truck, which was material exculpatory evidence because it could establish that there was a shoot-nut between Petitioner and Rose, in bad faith.

B. <u>The False Testimony of District Attorney Winier And Sharon Colman</u>.

Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated by the combined actions of the prosecutor and star prosecution witness Colman in testifying falsely at petitioner's trial regarding the substantial benefits conferred by the prosecutor upon Colman for

testifying against Phillips and failing to disclose the existence of such benefits to the defense prior to trial.

The following facts support this claim:

1. Immediately after her arrest. Colman was represented by Thomas Peterson (Peterson)

2. Years after his trial petitioner learned for the first time that, contrary to the testimony of both Colman and prosecutor Minter at his trial, Peterson had negotiated a deal for Colman in return for her testimony against petitioner. (Declaration of Attorney Thomas Peterson (Exhibit 8) 1 9.)

3. Attorney Peterson stated at paragraph 9 of his declaration dated 5 January 1987:

> "9. The agreement struck was that if Sharon Colman testified against Mr. Phillips implicating him in the murder and attempted murder charges she was to receive a plea to Penal Code 32 with a maximum of Probation and no more that (sic "than") one year in Madera County Jail. I did communicate this to Sharon Colman and she accepted. As I recall Sharon did question why she had to spend time in jail if she cooperated. I specifically recall her parents making some comment to me that why

should their daughter who was not guilty have to plead to anything when she was going to testify for the prosecution." (Emphasis added.)

4. The deal for Colman's testimony was never disclosed to

to the defense prior to trial. The jury never heard about this plea bargain for Colman's testimony against Petitioner.

5. On 4 January 1990, attorney Peterson testified that the plea bargain stated in the above quotation was struck with District Attorney Minier. (Reporter's Transcript, Exhibit 9, pp. 43-44.)

6. Madera County District Attorney Vinier testified at Phillips' trial as follows:

"Q. now on any of these occasions, did you suggest to Miss Colman that there would be any leniency if in fact she testified.

"A. No.

"Q. Did you make any inferences that if in fact she testified. things would go better for her?

"A. No.

"Q. Did you in and way communicate to Miss Colman that there would be any benefit to her in any way of testifying in this matter?

"A. No." (Guilt Trial Transcript, Exhibit 10, p. 324; emphasis added.)

4. Colman testified at Phillips' trial as follows:

"Q. And you expect to receive some benefit for testifying here today?

"A No.

"Q. You don't expect to receive any consideration whatsoever for testifying?

"A. I'm hoping that there will be consideration but -

"Q. You really expecting to receive some consideration?

"A. Are you asking me if I have been promised or is that -

"Q. I'm asking you for your expectation.

"A. I'm expecting that they would take into consideration that I am willing to cooperate." (Exhibit 10, pp. 223-224.)

7. The testimony of District Attorney Minier and Colman is in direct conflict with attorney Peterson's testimony

upon the issue of whether Colman was aware that she had been offered consideration from the prosecutor for testifying against Phillips.

8. If attorney Peterson's testimony is credited, Minier's trial testimony that he did not Shin any way communicate to Miss Colman that there would be any benefit to herr for testifying against Phillips is false because Minier communicated a plea bargain to Colman through Peterson, her then attorney of record.

9. If attorney Peterson's testimony is credited, Colman's trial testimony that she did not receive any hard consideration, such as a favorable plea bargain, from the prosecutor for testifying against Phillips is false because Colman accepted the District Attorney Minier's offer communicated by attorney Peterson of a section 32 plea in return for her testimony. was called off prior to her testifying against Phillips.

10. Phillips was prejudiced by the combined actions of the prosecutor and Colman as follows:

a. Because of the failure of the prosecution to disclose this information, the Phillips' guilt jury was not informed of important information regarding:

1. Colman's expectation of leniency and consideration from the prosecution in exchange for her testimony.

2. The prosecution's negotiations with Colman and Colman's attorney regarding the nature, timing and extent of the benefits conferred upon Colman.

3. Colman's continuing expectation of leniency which extended beyond the trial.

4. Significant impeachment of Colman's false testimony that she did not expect any reward for her testimony.

b. As a result of the failure to disclose this information, Phillips was also prejudiced in that:

1. Phillips was deprived of important information which was material to his defense.

2. Phillips was unable to introduce the information concerning Colman's expectation and receipt of an actual specified deal for her testimony and was thereby deprived of the opportunity to impeach Colman's FALSE testimony, as well was the FALSE testimony of the District Attorney himself.

11. As a result of this prejudice, it is reasonably probable that the result of the guilt phase trial would have been a verdict of a lesser degree of homicide or a finding that the special circumstance alleged was not true.

Colman's testimony included statements which, if believed by the jury, constituted strong evidence on the crucial issue of intent. Had defense counsel been aware of the undisclosed information, he could have presented evidence and argument that would have reduced Colman's credibility.

C. Ineffective Assistance of Counsel At Trial.

Petitioner's counsel rendered ineffective assistance of counsel regarding the guilt phase of trial in violation of

Petitioner's Sixth and Fourteenth Amendment right when he unreasonably failed to adequately investigate and present facts supporting a legal defense to the crimes to Petitioner's substantial prejudice.

The following facts support the claim that Attorney Martin did not effectively represent Phillips in his capital murder case:

1. Attorney Martin failed to adequately investigate or present the potentially meritorious defense that the special circumstance allegation that Phillips killed Bartulis with premeditation during a robbery is not true because Phillips actually shot at the victims for reasons other than robbery--that the crime was a robbery in the perpetration of murder rather than a murder in the perpetration of robbery. (For California standard see, *People v. Green* (1980) 27 Cal.3d 1, 59-62, 164 Cal.Rptr. 1 [robbery incidental to a murder will not support a robbery special circumstance finding].)

This defense is supported by evidence that immediately after the shooting Phillips told Colman that he shot at the victims because he thought they had set him up and/or for reasons related to Phillips' cocaine deal with the victims.

2 Attorney Martin failed to adequately investigate or present the potentially meritorious defense that the killing of Bartulis resulted from a shoot-out between petitioner and victim Rose which was initiated by Rose.

The shoot-out theory of the crimes is supported by Colman's preliminary hearing testimony that during the ride to Sacramento immediately after the shootings petitioner told Colman that his motive for shooting the victims was related to a cocaine deal, which would tend to negate robbery as the reason for the killing of Bartulis. It is also supported by the autopsy evidence that petitioner actually shot Bartulis discussed in Point 3 below.

The day of the crimes Tamera Nichols saw Graybill come home extremely upset. Graybill told Nichols that a

business deal had gone sour and ended in a shoot-out; Graybill said "all of a sudden both parties started shooting at each other." (Declaration of Tamera Nichols, Exhibit 11, ¶ 3.)

Gary Bishop was driving the truck with stolen property which the victims were to have purchased from Graybill. (Declaration of Gary Bishop, Exhibit 11, ¶ 4.) The morning after the crime, Bishop heard Graybill say he was present at the crime scene and "all hell brake loose." (Exhibit 11, ¶ 6.) Later, Bishop heard Graybill say several times that Phillips was lucky to have survived. (Exhibit 12, ¶ 8.)

Petitioner believes adequate investigation of available shoot-out evidence would have led attorney Martin to discover the testimony of Nichols and Bishop as stated in Exhibits 11 and 12.)

3. Attorney Martin failed to adequately investigate or present the potentially meritorious defense that available prosecution evidence shows that Rose actually shot Bartulis. The fact that Rose apparently shot Bartulis should suggest to

a reasonable defense counsel the possibility of a shoot-out between Rose and his assailant with Bartulis caught in the middle. Such a shoot-out would tend to negate a premeditated murder for purpose of robbery.

Autopsy photographs of Bartulis showing the path of the single fatal bullet shows that the bullet either entered Rose from the right side of his chest at about a 10-15 degree down angle or entered at his left rib cage. For petitioner to have shot Rose from his location at the driver's window of the victim's truck, the left rib wound had to be the entry rather than exit wound. However, the angle of the bullet is such that the gun would have to have been held below the driver's door for the rib would to be the entry wound.

Edward Bates was Sheriff/Coroner of Madera County when Bartulis was killed. Bates inspected the victim's truck shortly after the crime. Based upon this investigation and the autopsy photographs of Bartulis, Bates is of the opinion that tithe rods shown in the photographs of the victim's corpse are

not consistent with a conclusion that the wound in the victim's rib area was the entrance wound assuming that the fatal shot was fired from outside of the driver's side window (Declaration of Edward Bates, Exhibit 13, ¶ 7-)

The ballistics evidence regarding the path of the fatal bullet does not require this court to believe Phillips' statement that he shot at Rose and Bartulis during a shoot-out. However, the ballistics evidence strongly corroborates Phillips statement that he was engaged in a shoot-out with Rose. If Bartulis was shot from his right side, there is no other reasonable explanation for this fact except that Bartulis was shot by Rose.

The issue raised by the ballistics evidence is not whether attorney Martin must affirmatively seek evidence of a shoot-out. Rather, the issue is whether he must LOOK at available prosecution evidence and SEE that it shows Rose shot Bartulis. Upon the evidence available to attorney Martin, the applicable California State law required him to investigate possible alternative defenses to the proposed alibi defense.

Attorney Martin attempted to perform his duty as defense counsel in a capital murder case by giving Phillips copies of the police reports and then asking Phillips for his version of the events. In this manner, attorney Martin placed the burden of coming up with a viable defense upon Phillips, the criminal he was hired to defend, and essentially abdicated the duties of defense counsel.

3. Attorney Martin's actions and omissions described above were not and could not have been the result of any sound strategic decisions.

4. Two criminal defense lawyers experienced in capital cases are of the opinion:

(1) that the alibi defense was hopeless and attorney Martin should have forcefully so informed Phillips;

(2) that attorney Martin should not have allowed petitioner to testify to an alibi defense unless he insisted upon doing so after being advised that it was hopeless;

(3) that attorney Martin should have continued to investigate possible alternative defenses after Phillips said he was not present at the crime scene; and

(4) that the prosecution evidence available to attorney Martin suggested the two possible alternative defenses listed above. (Declaration of attorney Katherine Hart, Exhibit 14; Declaration of attorney Marshal Hodgkins, Exhibit 15.)

5. Phillips was substantially prejudiced by the above described failures of attorney Martin as follows:

a. Had counsel investigated the facts of the prosecution's evidence, along with seeking scientific and expert testimony, two viable defenses to the charges against Phillips could have been presented--(1) the crime did not occur in the commission of a robbery as alleged by the state; and (2) that during the course of a drug deal related shoot-out, it was actually the shot from Rose that killed Bartulis.

b. Instead of investigating and presenting the viable defenses described above, attorney Martin unreasonably

presented a hopeless alibi defense that was borne of desperation and had absolutely no chance of success.

c. If the proper defenses had been tendered, it is reasonably probable that a verdict of not true on the robbery special circumstance and a lesser degree of homicide would have been returned by the jury.

D. Bad Faith Destruction of Exculpatory Evidence.

1. Facts.

On 13 October 1989, the Madera County Superior Court granted petitioner formal discovery regarding what happened to the victim's Ranchero. (Exhibit 16, Item 1.)

The People responded that they basically lost this item, and had no adequate documentation of what happened to the item in question. (Exhibit No. 17.)

Through Petitioner's investigative efforts, the following information was developed:

Exhibit No. 18 is a true copy of George Hilton's declaration dated 31 July 1991.

Mr. Hilton's declaration indicates that he towed the vehicle to the State of California Criminalistic Crime Laboratory (DOJ) in Fresno, California upon request of Madera County Law Enforcement.

Exhibit No. 19 is a true copy of Frank Herget's declaration dated 2 August 1991

Mr. Herget's declaration indicates that it is DOJ's normal practice to accept an automobile for evidence processing only from a representative of a law enforcement agency and to return the evidence to law enforcement after it has been processed by DOJ.

Mr. Herget also stated that if a vehicle is processed and examined by DOJ a report is made by that agency. As of this date, the prosecution has not provided the defense with a copy of a DOJ report of their processing of the truck.

On 3 August 1990, the Honorable W.J. Harpham signed an order instructing the Department of Motor Vehicles (DMV) to conduct the necessary search to ascertain the final

disposition and/or whereabouts of the vehicle in question. (Exhibit 20.)

Exhibit No. 21 is a true copy of a DMV Application for Lien Sale Authorization and Lienholders Certification.

Exhibit No. 21 indicates that the vehicle was transferred from the DOJ to an automotive storage facility, Automotive Pool of Fresno, 4389 N. Motel Drive, Fresno, CA on 12 January 1978.

Exhibit No. 22 is a true copy of a DMV Additional Instructions for Lien Sale of a Vehicle valued at $200 or Less

Exhibit No. 22 indicates that Automotive Pool of Fresno, Inc. attached a lien on the vehicle in question, for storage fees. This was done through it's agent, Evelyn's DMV Service, 2720 S. Union Ave., Bakersfield, CA 93307

Exhibit 22 also indicates that the title of this vehicle was transferred to Mercury Casualty, P.O. Box 6467, San Jose, CA 95150 from the registered owner, Denise M. Rose, 227 S. Ashdale, West Covina, CA 91790; and the legal owner, Wells

Fargo Bank, Auto Lease Center, P.O. Box 816, Anaheim, CA

Exhibit No. 23 is a true copy of DMV Notice of Pending Lien Sale Form.

Exhibit No. 23 indicates that the registered and legal owners were notified on or about 10 January 1979 that the vehicle in question would be sold to satisfy the lien held by Automotive Pool of Fresno, Inc. on 20 February 1979.

Exhibit No. 24 is a true copy of a DMV Statement of Facts

form.

Exhibit No. 24 indicates that all parties had approximately 36 days notice of the pending sale of the vehicle in question, and no one moved to prohibit said sale.

Exhibit No. 25 is a true copy of a DMV Bill of Sale form.

Exhibit No. 25 indicates that the vehicle in question was sold on 20 February 1979 by Automotive Pool of Fresno, Inc., to Bill Long Used Cars; and on 18 August 1979 to Bill Long

Auto Dismantling from Bob Long Used Cars.

Exhibit No. 26 is a true copy of a DMV Report of Vehicle to be Dismantled form.

Exhibit No. 26 indicates that on 18 August 1979 Bill Long Used Cars filed with the DMV to dismantle the vehicle; and Bill Long Auto Dismantling filed a Dismantler's Notice of License Plate Destruction.

Exhibit No. 27 is a true copy of a Declaration by Pam Maestas, Custodian of Records for the DMV.

Exhibit No. 27 indicates that all documents from the California Department of Motor Vehicles are true and correct copies of the original records on file with the California Department of Motor Vehicles.

Petitioner believes that it reasonably can be inferred from Exhibits 18 through 27 that law enforcement had custody of the victim's truck, examined it at DOJ without report to petitioner, and thereafter released the truck for destruction without notice to petitioner's counsel.

Upon information and belief, neither petitioner nor his lawyer at the time received notice of intent to destroy the victim's truck.

Upon information and belief based upon statements of Denise M. Rose, the victim's wife, the vehicle was released from the custody of law enforcement by district attorney David Vinier.

Petitioner believes that two shots were fired from inside the vehicle. This belief is based upon the fact that petitioner later discovered two empty shell casings in Rose's .44 revolver.

Petitioner believes that the two rounds were fired in his direction because (1) a bullet hole found in the windshield of his car which was located behind him and (2) the position of the gun in Rose's hand and the direction his hand was pointed when petitioner removed the weapon from inside the vehicle. (See, Declaration of Richard Phillips, Exhibit 28, ¶ 34.)

VERIFICATION.

I, Richard L.A. Phillips, say:

I have single copies of the photographs which I have drawn the aforementioned allegations from, relating to the angle of the bullets, the autopsy, and the destroyed vehicle. These are my only copies I would be willing to make these available for review upon request.

I am the petitioner in this action; the above document is true to my own knowledge, except as to matters that are stated in it on my information and belief, and as to those matters, I believe it to be true.

Executed-on 28 February 1992 at Madera, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/

Richard Phillips
In propria persona

PRAYER.

WHEREFORE, Petitioner prays this honorable court:

1. Issue a writ of habeas corpus to have Petitioner brought before it to the end that he might be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional judgment convicting him of murder with special circumstances.

2. Conduct a hearing at which proof may be offered concerning the allegations in this petition;

3. Permit Petitioner, who is indigent, to proceed without prepayment of costs and fees; grant him permission to proceed in propria persona; grant him authority to obtain subpoenas without fee for witnesses and documents necessary to prove the facts alleged in this petition; and grant him sufficient funds to secure expert testimony necessary to prove the facts as alleged in this petition;

4. Require the Respondents to bring forth the entire state court record so that this court can review those parts of

the record that are relevant to the issues and defenses raised in this proceeding;

5. Stay all California court proceedings against Petitioner pending final disposition of this petition; and

6. grant such other and further relief as may be appropriate.

DATED: 28 February 1992

Respectfully submitted,

/s/

Richard Phillips

PROOF OF SERVICE

I am employed in the County of Fresno, State of California. I am over the age of eighteen and not a party to the within action. My business address is 1713 Tulare, Suite 137, Fresno, Calif. 93721.

On March 3, 1992, I served the within BRIEF IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS on the interested parties by placing a true copy thereof in a sealed envelope, with postage fully prepaid and placed in the United States mail at Porno. California, addressed as follows:

M.A. HAHN, DIRECTOR, MADERA
COUNTY DEPT. OF CORRECTIONS
14191 ROAD 28
MADERA, CA 93638

STATE ATTORNEY GENERAL
555 CAPITOL MALL
SACRAMENTO, CA 95814

I declare under penalty of perjury that the foregoing is true and correct.

DATE: March 3, 1992 /s/_____
ANN BULAICH

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX N

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
Deputy Attorney General
EDMUND D. McMURRAY
Supervising Deputy Attorney General
Counsel of Record
1300 I St., Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5281
Counsel for Petitioners

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
U.S. COURT HOUSE ROOM 5408
130 O STREET
FRESNO, CALIFORNIA 93721

Date: April 16, 1992

Reply to: K. Phillips, Civil Docketing - (209) 487-5037 (FTS#467) Eastern District of California at Fresno

Subject: New Appeals Docket Information

To: CLERK, U.S. COURT OF APPEALS
121 Spear Street
PO Box 193939
San Francisco, CA 94119-3939

AMENDED CASE INFORMATION

CASE TITLE: RICHARD LOUIS ARNOLD PHILLIPS
-v- DANIEL VASQUEZ

USDC CASE # CV-F-92-5167-REC-P
TYPE OF CASE: Civil
COURT REPORTER None
DOCKET FEE PAID: No.

USDC JUDGE: RE Coyle
COMPLAINT FILED: 3/4/92
APPEAL ORDER FILED 3/12/92
NOTICE OF APPEAL FILED: 4/10/92

Was Appellant granted IFP at trial? No
Was IFP status revoked? Date:
Was IFP status limited? If yes, explain:

Plaintiff/APPELLANT COUNSEL

Richard Louis Arnold Phillips
In Propria Persona
PO Box C-13707
Tamal, CA 94964

Defendant/APPELLEE COUNSEL

California State Atty General
Edmond McMurray
1515 K Street
Suite 511
PO Box 944255
Sacramento, CA 94244-2550
(916) 445-9555

Criminal counsel is: () Fed Dfndr () CJA
() Retained () Apptd

ACKNOWLEDGMENT OF RECEIPT BY APPEALS COURT

DATE RECEIVED: _____ BY: _____

CASE NUMBER ASSIGNED: _____

APPEAL NOTIFICATION FORM

TERMED APPEAL

U.S. District Court
EASTERN DISTRICT OF CALIFORNIA (Fresno)

CIVIL DOCKET FOR CASE #: 92-CV-5167

Phillips, et al v. Hahn, et al Filed: 3/4/92
Assigned to: Judge Coyle
Demand: $0,0000 Nature of Suite: 550
Lead Docket: None Jurisdiction: Federal question
Dkt# in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

RICHARD LOUIS ARNOLD PHILLIPS
Plaintiff

Richard Louis Arnold Phillips
[COR LD NTC] [PRO SE]
P O Box C-13707
Tamal, CA 94964

v.

M A HAHN, Director Madera
County Dept of Corrections
defendant
[term 04/16/92]

William Fjellbo
[term 04/16/92]
[COR LD NTC]
madera County Counsel
Madera County Government Center
209 West Yosemite Avenue
Madera, CA 93637
209-675-7717

DANIEL B VASQUEZ
defendant

California State Atty General
Edmond McMurray
1515 K Street
Suite 511
PO Box 944255
Sacramento, CA 94244-2550
(916) 445-9555

INTERNAL USE ONLY: Proceedings include all events TERMED APPEAL

1:92cv5167 Phillips, et al v. Hahn, et al

3/4/92	--	LODGED Application For Forma Pauperis (Not used - not required in death penalty cases) (PP) [Edit date 03/13/92]
3/4/92	1	PETITION FOR WRIT OF HABEAS CORPUS (gl) [Entry date 03/13/92]
3/4/92	2	APPLICATION by plaintiff for stay of further proceedings in the Madera Superior Court (gl) [Entry date 03/13/92]
3/12/92	3	MEMORANDUM in support of application [2-1] (gl) [Entry date 03/13/92]
3/12/92	4	ORDER by Judge Coyle denying application for stay [2-1], denying habeas corpus petition [1-1] terminating case (cc: all counsel) (gl) [Entry date 03/13/92]
3/12/92	5	JUDGMENT entered in favor of the respondent and against the petitioner (cc: all counsel) (gl) [Entry date 03/13/92]
3/12/92	6	NOTICE OF APPEAL by plaintiff from Dist. Court order/judgment of 3/12/92 [4-2], [5] (fee status: not paid) (kp) [Entry date 03/13/92]
3/13/92	7	FAXED COPY of Appellate Court Order denying petitioner's emergency motion to stay state court proceedings (kp)
3/20/92	8	MAIL Returned [5-1] addressed to plaintiff Richard Louis Arnold Phillips: not in custody (caf)

4/10/92	9	LETTER to court from plaintiff re Notice of Appeal, myself -v- the head of Madera; and myself -v- the Warden of San Quentin, please file the appropriate one. (kp) [Entry date 04/13/92]
4/10/92	10	LETTER to court from plaintiff re I respectfully disagree with your assessment of the 3/12/92 appeal being dismissed; the court took it upon itself to address all three documents in one response (kp) [Entry date 04/13/92]
4/10/92	11	NOTICE OF APPEAL by plaintiff from Dist. Court decision [4-2] (fee status: not paid) (kp) [Entry date 04/13/92]
4/13/92	12	MAILED case information/docket fee payment notice, copy of Notice of Appeal and appealed 3/12/92 order/judgment to 9th Circuit Court of Appeals. Copy of appeal and certified copy of docket sheet to all parties. (kp)
4/13/92	--	LODGED Order setting bond on appeal (kp)
4/15/92	13	ORDER by Judge Coyle setting bond on appeal in amount of $ -0- (kp) [Entry date 04/16/92]

INTERNAL USE ONLY: Proceedings include all events
1:92cv5167 Phillips, et al v. Hahn, et al
TERMED APPEAL

4/16/92	14	MAILED AMENDED case information/docket fee payment notice, copy of Notice of Appeal and appealed 3/12/92 judgment to 9th Circuit Court of Appeals. Copy of appeal and certified of docket sheet to all parties. (kp)

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF REVERSAL BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (BETTY B. FLETCHER, STEPHEN REINHARDT, AND ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX O

DANIEL E. LUNGREN
Attorney General
GEORGE WILLIAMSON
Chief Assistant Attorney General
ROBERT R. ANDERSON
Senior Assistant Attorney General
WILLIAM G. PRAHL
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Counsel of Record
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Sacramento, CA 94244-2550
Telephone: (916) 324-5281
Counsel for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

Petitioner and Appellant, 92-15828

v.

DANIEL B. VASQUEZ, Warden, San Quentin State Prison,

Respondent and Appellee.

On Appeal From An Order In A Habeas Corpus Proceeding

In The United States District Court
For The Eastern District of California
No. CIV-F-92-5167-REC-P

APPELLEE'S RETURN TO ORDER TO SHOW CAUSE

DANIEL E. LUNGREN
Attorney General of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

ROBERT R. ANDERSON
Senior Assistant Attorney General

WILLIAM G. PRAHL
Deputy Attorney General

EDMUND D. McMURRAY (State B
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P. O. Box 944255
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Attorneys for Respondent

BEST AVAI

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McClesky v. Zant,
499 U.S. ___,
113 L.Ed 517,
111 S.Ct. 1454 (1991)

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Penal Code
§ 1239(b)

BEST AVAIL

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARD LOUIS ARNOLD PHILLIPS,

Petitioner and Appellant, 92-15828

v.

EL B. VASQUEZ, Warden, San Quentin Prison,

Respondent and Appellee.

RETURN TO ORDER TO SHOW CAUSE

COMES NOW Respondent/Appellee, Daniel B. Vasquez, Warden of San Quentin State Prison, and makes this answer to the Order to Show Cause issued by this Court on December 2, 1993, in the appellate case of *Phillips v. Vasquez* No. 92-15828. Therein, this Court asked for a response to the following questions:

"(1) Each shall report on the status of any proceedings in respect to Richard Phillips convictions

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and sentence of death pending in the courts of the State of California.

"(2) Why should not this appeal be dismissed without prejudice as premature in that all proceedings in the state court had not been exhausted as of the time the petition was filed?

"(3) Why should not Richard Phillips make application in the state court for any materials, computer, investigations, etc. needed in aid of his appeals and habeas corpus review until a petition for habeas corpus is properly before this court?"

In answer to question (1), following the reversal of appellant's death sentence in *People v. Phillips*, 41 Cal.3d 29, 84, 222 Cal.Rptr. 127, 711 P.2d 423 (1985), appellant received a new penalty trial and again was sentenced of death. His automatic appeal (Cal. Pen. Code § 1239(b)) is presently pending before the California Supreme Court in *People v. Phillips*, No. S025880. On appellant's request for the appointment of counsel, appellant's advisory counsel in

the instant appeal pending before this Court, Donald J. Horvath, Esq., was appointed on April 19, 1993, to represent appellant in his automatic appeal before the California Supreme Court. Since that time, Mr. Horvath has applied for and received from the California Supreme Court six extensions of time to request correction of the record in the trial court, the latest being to December 23, 1993. The record on appeal has not yet been certified. Other than one request by appellant for a temporary transfer to the Madera County Jail from San Quentin Prison's death row to enable him to meet with his attorneys instead of them having to travel to San Quentin Prison to meet with him, which the California Supreme Court denied on August 11, 1993, respondent is unaware of any other pending matters related to appellant's pending automatic appeal before the California Supreme Court.

In answer to question (2), respondent submits that this appeal should be dismissed without prejudice as

premature since the state court proceedings have not yet been exhausted and, indeed, had not been exhausted when the petition was filed in the District Court. The closest case on point of which respondent is aware is *Hillery v. Sumner*, 496 F.Supp. 632, 637 (E.D. Cal. 1980), cited by this Court with apparent approval in *Hillery v. Pulley*, 733 F.2d 644 (9th Cir. 1984).[1/]

Therein, in discussing why Hillery's extensive delay in filing his federal habeas corpus petition challenging the racial makeup of the grand jury that initially indicted him was justified, Judge Karlton stated:

> "Although the California Supreme Court affirmed the guilt phase of petitioner's conviction in 1965, it reversed the death penalty imposed and remanded to the trial court for further proceedings. *People v. Hillery, supra*, at 713, 44 Cal.Rptr. 30, 401 P.2d 382. The appeal from the second penalty trial was not completed until 1967. *People v. Hillery* (1967) 65 Cal.2d 795, 56

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1. *Hillery* v. *Pulley* was affirmed sub. nom. in *Vasquez* v. *Hillery*, 474 U.S. 254 (1986).

Cal.Rptr, 280, 423 P.2d 208, *cert. denied*, 389 U.S. 986, 88 S.Ct. 486, 19 L.Ed.2d 496 (1968). In 1969, by writ, petitioner was successful in securing the reversal of the second penalty trial because of *Witherspoon* error. *In re Hillery* (1969) 71 Cal.2d 857, 79 Cal.Rptr. 733, 457 P.2d 565. At his third penalty trial, petitioner once again received the death penalty. In 1974, on automatic appeal to the California Supreme Court, the Court modified the penalty to life imprisonment. *People v. Hillery* (1974) 10 Cal.3d 897, 112 Cal.Rptr. 524, 519 P.2d 572. This protracted litigation in effect precluded federal court intervention. Had petitioner sought federal habeas relief while the state court litigation was continuing, considerations of comity and federalism would almost certainly have required dismissal. Both doctrines compel a respect for state functions and counsel against interference with ongoing state judicial proceedings. *Justice v. Vail* (1977) 430 U.S. 327, 335, 97 S.Ct. 1211, 1217, 51 L.Ed.2d 376; *Huffman v. Pursue, Ltd.* (1974) 420 U.S. 592, 601, 95 S.Ct. 1200, 1206, 43 L.Ed.2d 482; *Younger v. Harris* (1971) 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed 2d 669. Moreover, the California Supreme Court's determination on the guilt phase is unlikely to have induced a district court to hear petitioner's habeas since in this circuit, finality of one issue in the state courts is not generally sufficient to

circumvent the requirements of comity and federalism. *Drury v. Cox* (9th Cir. 1972) 457 F.2d 764, 765. Thus, it appears that at the earliest petitioner could not have filed in federal court until 1967 following the California Supreme Court's affirmance of the death penalty imposed at the second penalty trial, and perhaps not even until 1974 when the state litigation was finally resolved." (496 F.Supp. at 637.)

The rationale of Judge Karlton in *Hillery v. Sumner* is equally applicable to the instant case since appellant's automatic appeal following his second penalty trial is still pending before the California Supreme Court. This is especially true in this case. First, appellant's advisory counsel on the instant appeal is appellant's counsel on the appeal in the California State Court. Second, respondent has been led to believe that in counsel's duties of representing appellant, counsel may file state habeas corpus, and state habeas corpus is not limited solely to issues arising out of the second penalty trial.

(3) If this Court adopts respondent's position as to question No. (2), then, appellant's appeal being dismissed, there would be no pending federal habeas corpus case, and no cause for appellant to need "any materials, computer, investigations, etc." for use in any federal habeas corpus case in either the federal District Court or this Court. If appellant wishes to utilize such items on either his pending appeal or on habeas corpus in the California Supreme Court, that is something to be addressed by that state court, not this Court. Thus, this claim should also be denied.

Respondent/appellee recognizes that the dismissal of appellant's appeal would be without prejudice and that upon final resolution of this case by the California Supreme Court a subsequent habeas corpus petition filed by appellant in the federal court will not be treated as a successive petition under *McClesky v. Zant*, 499 U.S. ___, 113 L.Ed 517, 111 S.Ct. 1454 (1991).

CONCLUSION

For the foregoing reasons, the instant appeal should be dismissed without prejudice as being premature and appellant's request for "any materials, computer, investigations, etc." to perfect federal habeas corpus should also be denied.

Dated: December 23, 1993.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General.

ROBERT R. ANDERSON
Senior Assistant Attorney General

WILLIAM G. PRAHL
Deputy Attorney General

EDMUND D. McMURRAY (State Bar #42[illegible]
Supervising Deputy Attorney General

Attorneys for Respondent/Appellee

EDM:msd
SA92FA0027

DECLARATION OF SERVICE BY MAIL

Re: Richard Louis Arnold Phillips v. Daniel B. Vasquez
No. CVF-92-5167-REC-P

I, the undersigned, declare that I am over 18 years of age, and not a party to the within cause; my business address is P.O. Box 944255, Sacramento, California, 94244-2550. I served a true copy of the attached

RETURN TO ORDER TO SHOW CAUSE

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Donald J. Horvath
6592 North First Street
Fresno, CA 93710

Daniel B. Vasquez
Warden
San Quentin
California State Prison
San Quentin, CA 94964

Richard Lewis Arnold Phillips
P.O. Box C-13707
Tamal, CA 94964

Each said envelope was then, on December 23, 1993, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 23, 1993, at Sacramento, California.

_____

DECLARANT

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

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ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX P

DANIEL E. LUNGREN
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DEATH PENALTY CASE

RICHARD LOUIS ARNOLD PHILLIPS
Proceeding *pro se*
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San Quentin State Prison
San Quentin, Ca 94965

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS	)	Case No. 92-15828
Petitioner,	)	DC No. CVF92-5167-REC-P
vs.	)	
DANIEL B. VASQUEZ, Warden San Quentin State Prison	)	
Respondent.	)	

PETITIONER'S RESPONSE TO
ORDER TO SHOW CAUSE

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[TYPED] DEATH PENALTY CASE

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS	)	Case No. 92-15828
Petitioner,	)	DC No. CVF92-5167-REC-P
vs.	)	
DANIEL B. VASQUEZ, Warden, San Quentin State Prison,	)	PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE
Respondent.	)	

TO: THE HONORABLE JUSTICES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

PETITIONER'S RESPONSE

On 2 December 1993 this Court issued an Order to Show Cause in the above numbered case. This Order instructed Petitioner to respond to three (3) questions.

QUESTION #1: Each shall report on the status of any proceedings in respect to Richard Phillips convictions and sentence of death pending in the court of the State of California.

Subsequent to this Court appointing Donald J. Horvath as advisory counsel in the case at bar, Petitioner begged and cajoled Mr. Horvath into accepting appointment by the California Supreme Court in Petitioner's second automatic appeal.

The current status of this appeal is that there are points in the record which must be corrected. This may prove to be a long process, as we have some proceedings where the record states, "These pages missing. Report lost her notes."

There are no other proceedings before any other state courts.

QUESTION #2: Why should not this appeal be dismissed without prejudice as premature in that all proceedings in the state court had not been exhausted as of the time the petition was filed?

At the risk of incurring the wrath of the Court by sounding flippant, the simple answer

to Question #2 is that it is an incorrect statement. All proceedings related to the writ at bar were FULLY exhausted at the time the petition was filed.

Please indulge me as I take a moment to pitch the crux of my "amended" appeal which I recently submitted to advisory counsel for review.

I. FACTUAL BACKGROUND OF THE CASE

The factual background is fully set forth in the writ of habeas transferred to this Court as part of the record from the District Court, so Petitioner will only insert a brief recap.

On 20 February 1980 Petitioner was convicted of charges stemming from the 7 December 1977 killing of one man, and attempted murder of a second. The conviction was for first degree murder; attempted murder; and robbery, in Madera County Superior Court, State of California. Petitioner received a sentence of death.

On 31 December 1985 the California Supreme Court confirmed the guilt trial, but remanded as to penalty.

Petitioner then filed several writs of habeas corpus in superior court, attacking the guilt phase. As each was denied, Petitioner then filed original writs of habeas corpus in the State District Court, then State Supreme Court, with negative results.

After full exhaustion of state review on these various writs, Petitioner and advisory counsel generated a compilation of all state filings and submitted a writ of habeas corpus to the Eastern District Court.

While the federal writ was being prepared, a penalty phase retrial was conducted. On 13 March 1992 Petitioner was again sentenced to death.

II. QUESTIONS RAISED IN THIS APPEAL

A. Is Petitioner precluded from federal review of guilt issues fully exhausted at the state level, while awaiting a second,

unwaivable, automatic appeal in state court of unrelated penalty phase issues arising from partial retrial?

B. Will Petitioner be denied Due Process by have to let the guilt phase issues lay dormant, should this Court rule adversely on the first question.

III. **ARGUMENTS RE: DISTRICT COURT RULING**

A. The District Court erred in concluding that the writ at bar contains exhausted and un-exhausted issues, within the meaning of 28 U.S.C. § 2254 (b)(c); and *Rose v. Lundy*, 455 U.S. 509 (1982)

B. The District Court erred in its presumption that the issues raised in the writ at bar would IN ANY WAY be reviewed by the California Supreme Court on the automatic appeal of Petitioner's latest sentence of death.

C. The issues contained in the writ before the District Court are GUILT issues. The arguments therein do not turn on what

penalty is imposed. They are issues that stand on their own merit irrespective a sentence of death, or a lessor sentence.

D. Petitioner has made a proper showing that review of the guilt issues, both appellate and writ wise, are fully exhausted at the state level, and there are NO other state avenues available for further review of the presented issues.

E. This Court should direct the district court to rule on the merits of the writ in question without delay, as a logical extension of evolving death penalty litigation, and in light of your recent ruling in *Blazak* v. *Ricketts*, 971 F.2d 1408 (9th Cir. 1992).

IV. LEGAL ARGUMENTS

1. DISTRICT COURT'S RULING

A. Introduction

1. The tenor of the District Court's opinion was that the writ of habeas corpus submitted by Petitioner, contained issues not yet reviewed by the California

Supreme Court. The District Court wrote: [F]urthermore, a prisoner in state custody is required to exhaust state judicial remedies by affording the highest state court a fair opportunity to rule on the merits of the claims prior to bringing those claims to the federal courts."

2. The District Court determined that Petitioner has not met the requirements of 28 U.S.C. § 2254 (b)-(c). The United States Supreme Court defined this "total exhaustion" rule in *Rose* v. *Lundy, supra*.

The basis stated for the District Court's decision was: " . . . [although the petitioner alleges his guilt phase claims have been exhausted,] his death sentence has not been imposed or reviewed by the state courts." (Emphasis added.) (See District Court Denial Without Prejudice.)

3. In making the aforementioned determinations, the District Court failed to consider California Supreme Court's

established criteria for review. The California Supreme Court has clearly and repeatedly stated what may, and may NOT, be reviewed on a second automatic appeal when a death sentence is reimposed by a jury and trial court, in a retrial of the penalty phase only.

B. Standards

1. Federal

a. Title 28 USCS §2254 (b), (c) provide that a state prisoner's application for a writ of habeas corpus in a federal district court based on alleged federal constitutional violation will not be granted unless the applicant has exhausted the remedies available in the state courts.

2. State

a. The latest definitive statement of the California's standard for review was spelled out in *People* v. *Deere*, 53 Cal.3d 705; 280 Cal.Rptr. 424, 808 P.2d 1181 [May 1991] at pg. 713: *"Although the*

judgment was reversed as to penalty, it was "affirmed in all other respects." (citing omitted) *THUS, ONLY ERRORS RELATING TO THE PENALTY PHASE RETRIAL MAY BE CONSIDERED IN THIS SUBSEQUENT APPEAL."* (*People* v. *Durbin*, (1966) 64 Cal.2d 474, 477 [50 Cal.Rptr. 657, 413 P.2d 433; *People* v. *Smyers*, (1969) 2 Cal.App.3d 666, 668 [83 Cal.Rptr. 3].) (Emphasis added.)

3. Case

a. "The judgment is affirmed on the guilt phase and finding of special circumstances. The judgment is reversed on the penalty phase and remanded for a new penalty trial." *People* v. *Phillips*, 41 Cal.3d at pg. 84; 232 Cal.Rptr. at pg. 163

C. Review

1. That Petitioner has presented for review the entire contents of the writ of habeas corpus before the District Court, to the highest state court, is indisputable.

2. That the California Supreme Court will NOT grant further review of the issues presented is without question.

3.

3. In its simplest form, the issue of this appeal is not so much of exhaustion, but of first impression. Through all the rhetoric of who - what - when, the real question that must be answered is: From where do the alleged set of operative facts stem?

Petitioner contends a bifurcated death penalty case must be considered ripe for federal review, cause-by-cause, NOT as a single issue.

4. As stated above, Petitioner urges "first impression" as the standard for review of the "cause-by-cause" issue I will promote in my appeal. As a separate but intertwined line within the case, Petitioner also raises Due Process violation as a standard under which the cause-by-cause issue

should be judged.

D. Arguments

The holding of this court in *Blazak* v. *Ricketts, Supra* is not directly at issue here, but some of the Court's analysis is instructive. To reach *Blazak* I am compelled to look back for a moment.

1. The holding in *Rose* v. *Lundy, Supra* and subsequent writing by the U.S. Supreme Court on the subject of "Intertwined Exhausted and Unexhausted Claims," commonly called "total exhaustion" were for the purpose of:

a. Relieving, ". . . the district courts of the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims." *Lundy, Supra,* at 520.

b. Reduce piecemeal litigation.

c. Promoting comity.

d. Not impairing "prisoner's principal interest . . . in obtaining speedy federal relief on his claims." *Lundy, Supra,* at 520.

2. This Court has traditionally been a key advocate of a "total exhaustion" rule. See *Gonzales* v. *Stone,* 546 F2d 807.

3. 28 U.S.C.§ 2254 (c) states: "An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

In this case, the California Supreme Court has confirmed the conviction. Additionally, the California Supreme Court has had the opportunity to review all the subsequent Petitions for Review, and original writs of habeas corpus, as separate motions. The issues contained in the writ of habeas

corpus before the District Court is a compilation of the state petitions. The issues are guilt issues. They do not turn on what penalty is imposed. They are issues which stand on their own merit irrespective of sentence.

The California standard articulated in *People* v. *Deere, Supra,* validates Petitioner's argument that he has fully exhausted state review.

Petitioner comes full circle to this Court's ruling in *Blazak*. The Court's writing envisioned a very similar scenario: "Even if the district court's grant of the writ is ultimately overturned, all of the conviction challenges will be resolved and leave only the sentencing issues to be considered."

The *Blazak* Court went on to say, " . . . an affirmance on appeal will obviate altogether the need for either the district court or this court to address Blazak's penalty phase claims."

The same applies to the case at bar. If the district court, this Court, or the U.S. Supreme Court grants relief on the writ attacking the guilt phase, the penalty phase issues stemming from a partial retrial, become moot.

Petitioner's second automatic appeal is fairly straight forward. Petitioner WILL allege constitutional violations, including prosecutorial misconduct. This misconduct occurred in the retrial of the penalty phase, but not during the guilt trial. The issues are not intertwined.

This brings the argument to "cause-by-cause." It is the position of Petitioner that the alleged operative facts in a guilt trial held over 12 years ago (1979-80), MUST be deemed a separate entity from the alleged operative facts stemming from a penalty retrial held in 1991-92. Although originating from the same case, the alleged operative facts were from two different proceedings, two

different attorneys, two different judges, and two different juries. Thus, two separate entities.

To accept the District Court's apparent position that the standard should not be what Petitioner refers to as "cause-by-cause" ignores a potential major flaw in that rationale.

What if the California Supreme Court DOES agree with Petitioner's arguments during the penalty phase only, second automatic appeal?

What happens if the California Supreme Court orders another penalty phase retrial, and Petitioner is sentence to death a third time? (This has happened in at least two California cases.)

This very real concern was addressed in *Blazak, supra, fn.* 7 "Moreover, unlike habeas grants exclusively on sentencing issues, the grant of a habeas petition because of the constitutional invalidity of a conviction raises concerns that a possibly innocent

person has been unjustifiably incarcerated on death row for a number of years. Delaying retrial in such cases, while attorneys fight over a sentence that may no longer exist, risks the perpetuation of a monumental injustice, should retrial ultimately result in an acquittal."

A death penalty litigant who has been confirmed as to guilt, but retried once, twice, or even three times as to penalty, must be distinguished from the litigant who has failed to exhaust one or more issues stemming from the same operative facts.

This bifurcated scenario was distinguished in *Burkett* v. *Cunningham*, 826 F.2d 1208 (3rd Cir. 1987). In *Burkett*, petitioner filed two habeas corpus appeals, arising out of three state court convictions from the same county. The appeals were referred to by numbers, with the first being 140/141, the second 161. The Court's opinion, footnote 32 states in relevant part: "We note

also that even were we to find claims concerning 161 unexhausted, relief would not be barred on the 140/141 claims, since they arise from a wholly separate convictions. The "total exhaustion" rule of *Rose* v. *Lundy*, (citings omitted), applies only to claims arising from a single criminal case."

Petitioner acknowledges his claims stem from a single "criminal case," however, I urge that when there has been:

a. A guilt, then penalty trial:

b. A state appeal, followed by two (2) writs of habeas corpus, wherein the guilt phase issues were fully exhausted as to state court review:

c. A second penalty trial some 12 years later, before a different trial court and jury.

the second, controlling penalty phase becomes analogous to a "separate case."

V. CONCLUSION

A. I've run off at the fingers much longer than anticipated, in an attempt to make the following points:

1. My writ of habeas corpus does NOT contain any issues that the highest court in the state of California wasn't afforded full opportunity to review;

2. I did NOT submit the writ of habeas corpus to the district court until such time as all rulings were final at the state level; and

3. *Rose* v. *Lundy, Supra* says Petitioner is ripe for federal review.

B. Petitioner fully realizes "conventional wisdom" of death penalty litigation on the average case says you take every opportunity for delay.

The "average case" doesn't have the Sheriff-Corner of the county at the date of the offense, now stating that Petitioner could NOT have fired the fatal shot.

The "average case" doesn't have critical police reports surfacing for the first time, some 13 years AFTER the first trial.

The "average case" doesn't have a key official of the California Supreme Court making a statement to a member of the bar concerning Petitioner's case, that " . . . in death penalty cases the (California) Supreme Court doesn't even read pro per petitions."

For these reasons, Petitioner has chosen to ignore "conventional wisdom."

QUESTION #3: Why should not Richard Phillips make application in the state court for any materials, computer, investigations, etc. needed in aid of his appeals and habeas corpus review until a petition for habeas corpus is properly before this court?

1. **STATE COURT**

A. Petitioner does not have the same status before the state court as he does in the federal system.

Petitioner had originally intended to proceed *pro se* with advisory counsel in his second automatic appeal of the penalty phase,

in the California Supreme Court. (Current there is NO inmate in the state of California under sentence of death who has been approved by the California Supreme Court to proceed *pro se* with or without advisory counsel, in their automatic appeal.) After seeking input from Mr. McMurray of the California State Attorney General's office (Mr. McMurray is an Assistant Attorney General. Petitioner has been assigned to Mr. McMurray's caseload continuously since 1980), as well as discovering the California Supreme Court's policy, practice, and procedure concerning petitions filed by *pro se* inmates, (See response to Question #2 herein), Petitioner reluctantly decided to seek counsel. (See response to Question #1 herein.)

[FOLLOWING HANDWRITTEN]

NOTE: On or about 1 December 1993, my typewriter was inadvertently damaged by staff. Since that time I have tried to send the unit out for repair.

On or about 15 December 1993, Wendy Peoples, Attorney at Law from the California Appellate Project, attempted to expedite this

repair through contacts to the office of Denise Dall, Legal Affairs Coordinator, San Quentin State Prison. As of this seating, Ms. Dall has not returned Ms. People's call.

On or about 21 December 1993, Petitioner spoke with Correctional Officer Lawson, in the presence of Correctional Officer Gregby. Officer Lawson is the Property Officer for Condemned Row II. During this conversation Petitioner was told that there was no current program to send my typewriter out for repair, and that if I had a deadline from the Court I would have to submit it handwritten.

I apologize in advance for my handwriting. I submit I'm the only death penalty litigant currently before this court who submits handwritten pleadings. This is another reason why the court should not summarily dismiss the Petition for Pro Per Reviews.

2. PETITION BEFORE THIS COURT FOR INVESTIGATOR FEES/FUNDS

A. Since Petitioner files his motion for funds so an investigator could gather documents for review by Mr. Horvath, (advisory counsel for the matter at bar) Mr. Horvath has been appointed by the California Supreme Court to represent Petitioner in his second automatic appeal. As such, Mr. Horvath has been provided all penalty retrial documents.

Therefore Petitioner withdraws his motion for funds for an investigator.

3. **STANDINGS BEFORE THIS COURT**

A. Petitioner currently has standing before this Court; has been granted *pro se* status (with advisory counsel); and therefore his Petition for Pro Per Provisions is both proper and timely.

1. After the district court refused to issue a certificate of probable cause, (CPC) Petitioner filed for a CPC before this Court.

As this Court recently reiterates in *Clark* v. *Lewis*, 1 F.3d 814 (9th Cir. 1993), following the dictates of *Barefoot* v. *Estelle*, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394, 77 L.Ed.2d 1090 (1983), "This court should grant an application for a certificate of probable cause to appeal only if the petitioner makes a substantial showing. . . . To make this substantial showing, a petitioner must demonstrate that the issues are "debatable among jurists of reason," that a court could resolve the issues differently, or that the issues are "adequate to deserve encouragement to proceed farther."" *Clark* v. *Lewis*, *Id.* at 819.

The sole question of law issue in Petitioner's application for CPC is:

"8. A Certificate of Probable Cause should issue in the case at bar to address the following issues: Is Petitioner precluded from federal review of guilt issues fully exhausted at the state level, while awaiting a second, unwaivable, automatic appeal in state court of penalty phase issues arising from a partial retrial?"

On 18 June 1992 a CPC was issued by this Court, to address the above question.

B. <u>The Catch-22</u>: **LET ME BE CLEAR**: I chose to proceed <u>pro se</u> with advisory counsel, not because I'm some kind of "control freak," or think I'm a legal super star. I am <u>very</u> cognizant of my limitations, as well as such potential pitfalls as "tunnel vision" as it applies to this case.

ON THE ONE HAND: This Court, relying on *Coleman* v. *Thompson*, ___ U.S. ___, ___ ___ ___, 111 S.Ct. 2546, 2566-67, 115 L.Ed.2d 640 (1991) recently held in *Bonin* v. *Vasquez*, 999 F.2d 425 (9th Cir. 1993) that there is no

Sixth Amendment right to counsel in either federal or state postconviction or habeas proceedings.

ON THE OTHER HAND: The consistent tenor of the State is: (In response to inmate appeal for more than 2-1/2 hrs. per week access to the law library; inmate appeal to possess more than 10 books total [including law books]; and inmate appeal to expand hrs. which legal mail may be sent out via post-main-originals available for review upon request) "We are providing the same amount of time/access for all inmates. In your case you . . . have a court appointed attorney, assistant, or advisor."

In Plain English, the field of play is increasingly unilevel! There isn't an attorney's office in the Attorney General building handling the complex issue of death penalty litigation who doesn't have a complete - is restricted to 2-1/2 hrs. per week in the Law Library - may only have 10 books in his office - and sometime access to a photocopier. When the state refuses to even consider the needs of a pro se litigant, this Court should step forward.

ADDITIONAL ISSUE: Petitioner respectfully requests this Court to a moment and outline what advisory counsel will be paid for. In the past I have submitted my work product to Mr. Horvath, i.e. the response to question #2 herein. Mr. Horvath would then edit as necessary, then have copies printed. We have found this to be a functional way to proceed. If this is beyond the scope of this Court's idea of advisory counsel's level of participation, please apprise Mr. Horvath and myself at your earliest convenience.

CONCLUSION: The state court recognizes validity of going forward on litigating guilt phase issues, independent of penalty, by issuing a stay order. The state court of

appeals AND state supreme court had the opportunity to tell me such petitions were premature - not ripe for review, and did NOT do so.

The state courts each had before it two (2) petitions in which to make such a ruling. Had they considered the petitions premature - - - the state's highest court has washed its hands as to guilt, in this case.

This Court should issue order for Pro Per Provisions so that Petitioner and advisory counsel can prepare documents via file sharing, as we have in the past, and allow Petitioner to fully brief this appeal.

DATED: 29 December 1993

/s/
Richard Lewis Arnold Phillips
In Pro Se

ADDENDUM

On 27 December 1993 Petitioner received the State's response to this Court's instant questions. Petitioner respectfully requests this Court to take notice that as to Petitioner's claims of proper legal standing, necessity of equipment to properly appeal on a level field of play; security arguments; and promotion of fiscal economy, were unrefuted by the State.

CERTIFICATE OF SERVICE

Richard Louis Arnold Phillips) Case No. 92-15828

Petitioner

vs.

Daniel B. Vasquez, Warden
San Quentin State Prison,

Respondent.

I, the undersigned, hereby certify that I am a citizen of the United States, that I am over the age of 18 years, and am a party to the within entitled action. My business/residence address is:

P.O. Box C-13707 S-E-71
San Quentin State Prison
San Quentin, CA 94964

I served a copy of the attached:

PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE MOTION TO AMEND - REQUEST FOR PRO PER PROVISIONS

upon the interested parties by placing a true and correct copy thereof in an envelope and sealing same, postpaid and by depositing same for delivery in the United States mail at San Quentin State Prison, concerning inmate delivery to correctional authorities of outgoing mail, addressed as follows:

STATE ATTORNEY GENERAL
P.O. Box 944255
Sacramento, CA 94244-2550

DANIEL B. VASQUEZ, Warden
San Quentin State Prison
San Quentin, CA 94964

I declare under penalty of perjury that

the foregoing is true & correct, and that this was executed on the 29th Day of December 1993, at San Quentin, California

/s/
Richard Louis Arnold Phillips
In Pro Se

No. 95 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR CALDERON, Warden of San Quentin Prison and
DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

RICHARD LOUIS ARNOLD PHILLIPS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
FROM JUDGMENT OF REVERSAL BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(BETTY B. FLETCHER, STEPHEN REINHARDT, AND
ANDREW J. KLEINFELD, CIRCUIT JUDGES)

PETITION FOR WRIT OF CERTIORARI

APPENDIX Q

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

No. 92-15825

Petitioner and Appellant,

v.

DANIEL B. VASQUEZ, Warden,
San Quentin State Prison,

Respondent and Appellee.

_____/

On Appeal From An Order In
A Habeas Corpus Proceeding
In The United States District Court
For The Eastern District of California
No. CIV-F-92-5167-REC-P

RESPONSE TO ORDER TO SHOW CAUSE

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LOUIS ARNOLD PHILLIPS,

No. 92-15828

Petitioner and Appellant,

v.

DANIEL B. VASQUEZ, Warden, San Quentin State Prison,

Respondent and Appellee.

_____/

RESPONSE TO ORDER TO SHOW CAUSE

Donald J. Horvath, advisory counsel for Richard Phillips, answers the questions stated in this court's Order to Show Cause dated 2 December 1993 as follows:

1. STATUS OF CALIFORNIA COURT PROCEEDINGS

Richard Phillips (petitioner) has pending in California courts only his automatic appeal from the death sentence imposed upon him after his second (1991) penalty trial--California Supreme Court Action No. S025880.

The second penalty trial occurred because of the judgment on appeal from petitioner's

original death sentence. The California Supreme Court affirmed the adjudication of petitioner's guilt and the special circumstance finding, but remanded the cause for a new penalty trial. (*People v. Phillips* (1985) 41 Cal.3d 29, 84, 222 Cal.Rptr. 127.)

On 19 April 1993, the California Supreme Court appointed me in Action No. S025880 to represent petitioner on his automatic appeal from the 1991 death sentence, "including any related habeas proceedings."

By letter of 30 April 1993, I asked an employee of the California Supreme Court, Mr. Robert Reichman, whether my appointment in this case includes habeas corpus proceedings which attack the adjudication of guilt.

On 18 May 1993, Mr. Reichman called me on the telephone and stated the following: My appointment includes guilt habeas corpus petitions. However, petitioner's two previous habeas corDus Dleadinqs filed in the

California Supreme Court[1] had been denied on the merits. Therefore, I would not be paid for doing any habeas corpus issues attacking the guilt adjudication which had been raised in the prior pleadings; I would be paid only for habeas corpus proceedings directed to guilt issues grounded upon new facts not reasonably available to the defense at the time of the prior habeas corpus petitions.

This statement is consistent with the California Supreme Court's subsequent decision barring repetitive habeas corpus petitions absent extraordinary circumstances. (*In re Clark* (1993) 5 Cal.4th 750, 21 Cal.Rptr.2d 509.)

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[1] Mr. Phillips filed a petition for review from the Court of Appeals' denial of his petitoin for writ of habeas corpus in Action No. F014410. I believe the Supreme Court number for this action is S021131.

Mr. Phillips also filed an original habeas corpus petition in the Supreme Court after the Court of Appeal denied his habeas corpus petition in Action No. F016599. I believe the Supreme Court number for this action is S023004.

The record on appeal has not yet been certified in petitioner's automatic appeal. A trial court motion to correct the record on appeal is due on 12 January 1994. I expect to file the motion by that date.

2. THIS APPEAL SHOULD NOT BE DISMISSED AS PREMATURE.

This court has asked why the appeal should not be dismissed as premature because all proceedings in the state court had not been exhausted as of the time the petition was filed.

There is no legal requirement that all state court proceedings related to punishment be completed before a federal habeas corpus petition attacking a guilt adjudication which is final in state courts may be filedv The only requirement for federal habeas corpus relief is that all available state remedies upon the issues raised in the federal Detition be exhausted. (28 U.S.C. § 2254 subd. (b); *Rose v. Lundy* 455 U.S. 509, 71 L.Ed.2d 379,

102 S.Ct. 1198 (1982).)

In *Rose*, our SuDreme Court held that state prisoners who file federal petitions which raise both issues which have been fully litigated in state court and issues as to which they have not exhausted state remedies are entitled to resubmit their federal petition with only exhausted claims. (455 U.S. at p. 520.) Here, petitioner has raised only exhausted claims in Mis federal petition; he is entitled to proceed in federal court pursuant to this direct holding of the United States Supreme Court.

In *Rose*, our Supreme Court explained the reasons for the rule requiring a state prisoner to exhaust available state remedies before seeking federal habeas corpus relief. The court stated that the exhaustion rule is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." The rule also promotes comity

between state and federal courts by encouraging state prisoners to seek relief first from state courts and thereby giving state courts the first opportunity to review claims of constitutional error. (455 U.S. at p. 518.)

The California courts have had the opportunity to consider all issues raised in petitioner's federal habeas corpus petition and to grant him appropriate habeas corpus relief--the California Supreme Court has considered and denied on the merits every issue raised in petitioner's federal habeas corpus petition.

All issues raised in petitioner's federal habeas corpus petition attack the constitutional validity of the adjudication made in petitioner's 1980 trial that he is guilty of murder with special circumstances. The adjudication of petitioner's guilt of murder with special circumstances is final in the California courts. Petitioner's guilt

adjudication has been affirmed on direct appeal to the California Supreme Court. All collateral constitutional attacks upon the guilt adjudication urged in petitioner's federal habeas corpus petition have been raised in state habeas corpus petitions which were litigated as high as the California Supreme Court and denied on the merits by that court.

It would promote comity between state and federal courts to consider petitioner's federal habeas corpus constitutional attacks upon the guilt adjudication eforexthe California Supreme Court decides penalty issues. The guilt adjudication is final in California courts. If petitioner's constitutional attacks upon the guilt adjudication in federal court have merit, he is entitled to a new guilt trial. No penalty can be imposed absent a constitutional adjudication of guilt. Therefore, a prompt adjudication of guilt issues in federal court

would relieve the California Supreme Court of the burden of deciding moot penalty issues in the pending automatic appeal from the death penalty. Since the California Supreme Court is very busy, it should welcome any federal adjudication which would relieve it of unnecessary work.

A rule of law which requires that the penalty portion of petitioner's case finally be decided by California courts before he can make a federal habeas corpus attack upon the validity of the guilt adjudication long final in California courts would result in needless delay which would severely prejudice petitioner's ability to prove the factual allegations made in his federal habeas corpus petition. The crime was committed in 1977--sixteen years ago. Petitioner's guilt trial, the result of which he attacks upon various constitutional grounds in his federal petition, occurred in 1980--thirteen years ago.

It will take several years for the pending penalty appeal to ogre be decided by the California Supreme Court. If petitioner's present death sentence is reversed on direct appeal, there will be yet another penalty trial and yet another automatic direct appeal. The process of penalty reversal and retrial could continue for a very long time.

Thus, if petitioner must wait for the penalty aspects of his case to be finally determined in state courts before he is allowed to attack the long final California guilt adjudication in federal court, he may be forced to litigate facts which occurred more than twenty years before the federal habeas corpus hearing! Witnesses die. Memories fade. Since petitioner has the burden of proving the constitutional defects in his 1980 guilt trial asserted in his federal petition, (*Burkett v. Cunningham*, 826 F.2d 1208, 1218 (3rd Cir. 1987) he is the party who will be prejudiced by the loss of material evidence when

witnesses die or they no longer can remember what happened[2].

A rule of law which requires that the penalty portion of petitioner's case be finally decided by California courts before he can make a federal attack upon the validity of the guilt adjudication long final in California courts will not result in a more efficient administration of justice in federal habeas corpus proceedings.

Petitioner's guilt trial, which is attacked in his federal petition here at issue, occurred in 1980. Petitioner's second penalty trial, which will be reviewed in his pending state appeal, occurred eleven years later in 1991. Where the issues of guilt and

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[2] Richard Graybill, who petitioner says was a witness to the crimes, has already died. At petitioner's second penalty trial, the court excluded testimony of Tamera Nichols, then Graybill's live-in girlfriend, which would support a finding that Graybill witnessed the crime. On appeal, I will argue that the exclusion of this evidence was prejudicial error.

penalty are bifurcated and decided in separate trials over a decade apart, there will be no factual or legal issues common to both trials. Therefore, the federal courts will gain nothing by delaying action upon the guilt issues raised in the instant habeas corpus petition until penalty issues are finally decided by California courts.

Appellee ignores the federal statute and United States Supreme Court decision which each clearly state that the only requirement for federal habeas corpus relief is that the issues raised in the federal petition be exhausted in state court. (28 U.S.C. § 2254 subd. (b); *Rose v. Lundy* 455 U.S. 509, 71 L.Ed.2d 379, 102 S.Ct. 1198 (1982).) Appellee suggests that *Hillery v. Summer*, 496 F.Supp. 632, 637 (E.D. Cal. 1980) is determinative of the issue raised by this court. (Appellee's Return to Order to Show Cause, pp. 2-3.)

Appellee is wrong. A district court obviously does not have the power to overrule

both the Congress and the United States Supreme Court regarding the requirements for a state prisoner to seek federal habeas corpus relief. *Hillery* was decided two years before *Rose* and obviously did not deal with the articulation in *Rose* of the relationship between state and federal courts in the area of federal habeas corpus. The issue in *Hillery* was whether a state prisoner may decide to wait until his state criminal case was final as to penalty before seeking federal habeas corpus relief. The issue here is whether a state prisoner who desires speedy federal relief on guilt issues must wait for penalty issues to be decided before seeking federal relief.

3. PETITIONER NEEDS MATERIALS TO PROPERLY PROCEED IN PROPRIA PERSONA WITH THIS APPEAL FROM THE ERRONEOUS DISMISSAL OF HIS HABEAS CORPUS PETITION.

The court has asked why petitioner should not make application to state courts for the computer and other materials he has requested

in this court "until a petition for habeas corpus is properly before this court?"

Petitioner is proceeding in propria persona (with advisory counsel) in this appeal from the dismissal without prejudice of his habeas corpus petition. For the reasons stated in Point 2 above, the appeal has merit--petitioner's federal habeas corpus petition raising only exhausted guilt issues should not have been dismissed by the district court.

In state court, petitioner has appointed counsel to represent him. The California Supreme Court will not give petitioner the materials which he has requested because he is represented by counsel on automatic appeal from his second death sentence.

Assuming arguendo that petitioner otherwise legally is entitled to the materials he seeks. petitioner needs such materials in order to represent himself on this appeal.

As I previously have stated, it would

help petitioner and I to prepare petitioner's briefs on this appeal if he had access to his computer and my past experience with petitioner is such that I do not believe he would abuse the privilege if granted access to a computer.

I request the court's guidance regarding my duties as advisory counsel. In particular, may I write briefs for petitioner?

CONCLUSION

This appeal should not be dismissed as premature.

Since the appeal has merit, the case should be set for hearing in this court as soon as possible so that the erroneous judgment below may be reversed and a serious constitutional issues raised petition may be held without further delay.

DATED: 30 December 1993

/s/

J. Horvath

DECLARATION OF SERVICE BY MAIL

Re: Richard Phillips v. Daniel Vasquez No. No. 92-15828

I, Donald Horvath, declare that I am over 18 years of age, and not a party to the within cause; my business address is 6592 North First Street, Fresno, California 93710. I served a true copy of the attached

RESPONSE TO ORDER TO SHOW CAUSE

on each of the following, by placing same in an envelope addressed respectively as follows:

Daniel E. Lungren, Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550
Att: Edmund D. McMurry, Esq.

Mr. Richard Phillips
C-13707 5-E-71
San Quentin Prison
San Quentin, CA 94964

Each envelope was then, on 30 December 1993, sealed and deposited in the United States mail at Fresno, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perJury that the foregoing is true and correct.

Executed on 30 December 1993 at Fresno, California.

Donald J. Horvath